

CRIMINAL REVISION.

Before Mr. Justice Mya Bu.

1936

Mar. 25.

HTANDA MEAH

v.

ANAMALE CHETTYAR.*

Notice of appeal—Accused convicted and fined—Compensation to complainant out of fine—Appeal by accused against conviction—Notice to District Magistrate—Acquittal by appellate Court—Extinguishment of compensation—No notice of appeal to complainant—Notice not required by law—Illegality—Revision—Criminal Procedure Code (Act V of 1898), ss. 422, 545 (1) (b).

There is no provision of law requiring a Court of appeal to issue notice of an appeal by the accused to the complainant where an order of acquittal by the Court of appeal involves the extinguishment of an order for payment of compensation to the complainant under s. 545 (1) (b) of the Criminal Procedure Code. The only notice required by law is to the District Magistrate (the officer appointed by the Local Government) under s. 422 of the Code. In such circumstances the appellate Court has not acted illegally or without jurisdiction and no revision lies to the High Court.

Bharasa Naw v. Sukdeo. I.L.R. 53 Cal. 969—*distinguished*.

K. C. Sanyal for the applicant.

Guhu for the respondent.

MYA BU, J.—This is an application for revision of an order passed by an appellate Court. As under section 417 of the Criminal Procedure Code an appeal is permitted against an order of acquittal, the High Court does not ordinarily entertain an application for revision of such an order. The ground on which interference by this Court in revision is urged is in short that the order of acquittal has been made with illegality and without jurisdiction, and if there be illegality in the proceedings in the Court which passed the order of acquittal, or if the order was made without jurisdiction, then I have no doubt that this Court would be exercising its discretion in a proper manner by

* Criminal Revision No. 96B of 1936 from the order of the Sessions Judge of Henzada in Criminal Appeal No. 509 of 1935.

interfering, in revision, with the order. The reasons for denouncing the order of acquittal as illegal and without jurisdiction are these.

The respondent was prosecuted by the applicant in the Magistrates' Court for an offence under section 406 of the Indian Penal Code and was convicted by the Magistrate who passed a sentence of fine of Rs. 1,000 or in default six months' rigorous imprisonment and also an order under section 545 (1) (b) of the Criminal Procedure Code directing the payment of Rs. 500 out of the fine, if realized, to the complainant as compensation.

The respondent appealed against the conviction and sentence, and after due notice of the hearing of the appeal to the District Magistrate as required by section 422 of the Criminal Procedure Code the appellate Court found that the conviction could not stand and therefore set aside the conviction and sentence passed on the respondent by the Magistrate. The order of the appellate Court makes no reference whatever to the Magistrate's order for the payment of Rs. 500 out of the fine to the applicant (complainant), but the necessary consequence of the setting aside of the conviction is the setting aside of the sentence of which the necessary consequence is the extinguishment of the order made under section 545 (1) (b) of the Criminal Procedure Code.

Throughout the proceedings in the appellate Court no notice whatever was issued to the applicant. It is, therefore, contended on behalf of the applicant that, in view of the possibility of the appeal ending in an order of acquittal involving the extinguishment of the order of the Magistrate for payment to the applicant of the sum of Rs. 500 out of the fine, which would consequently be tantamount to an order to the detriment of the applicant, the appellate Court acted illegally and without jurisdiction in passing the order of acquittal

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without having previously given him (applicant) an opportunity to appear and support the conviction. Such a notice is not required by any provision of law, and an omission to issue notice of the hearing of an appeal from a conviction to the complainant in the trial Court unlike the omission to issue notice of an appeal prescribed by section 422 of the Criminal Procedure Code cannot, by any means, be said to be an illegality.

Does an omission to issue notice of such an appeal to the complainant in the original trial become an illegality by reason of the fact that an order of acquittal passed by the Court of Appeal would involve the extinguishment of an order for payment of compensation under section 545 (1) (b) of the Criminal Procedure Code? In my opinion it does not. As I have already observed there is no provision of law which requires notice of an appeal to be issued to the complainant in the trial Court. The most that can be said is that inasmuch as the appeal might end in an order of acquittal which would involve the extinguishment of an order under section 545 of the Criminal Procedure Code in favour of the complainant in the original trial it is desirable that a notice of the appeal should be given to him. But this view of the matter will not justify the statement that owing to the omission to issue such a notice in such a case the Court has acted illegally or without jurisdiction.

The case of *Bharasa Nax v. Sukdeo* (1) has been relied on in support of the application. In that case it was said that

"an appellate Court should, in the exercise of a proper discretion, give notice of the hearing of the appeal from a

conviction to the complainant when an order of compensation has been made in his favour under section 545 of the Criminal Procedure Code."

As this pronouncement does not support the assertion that omission to issue such notice is an illegality, I do not think it is necessary to comment on it, in the present case. I am unable to understand why the complainant in the trial Court who would not be in law, entitled to notice of the hearing of the appeal against a conviction passed by the trial Court where no compensation is awarded under section 545 should be entitled to a notice of the hearing of the appeal simply because the trial Court has thought fit to award him compensation out of the sentence of fine. The fact that the complainant in the trial Court has no right to a notice of the appeal from a conviction shows that it is the concern of the Crown and not of the private prosecutor to support the conviction in the Court of Appeal. The mere fact that he is interested in the order of compensation cannot in my opinion justify the view that he is entitled to notice not with reference to the order under section 545 of the Code of Criminal Procedure but with reference directly to the hearing of the appeal. In *Bharasa Naw v. Sukdeo* (1) there was not only an omission by the appellate Court to issue notice to the complainant in the original trial but also an omission to issue notice under section 422 of the Criminal Procedure Code. The omission to issue notice under section 422 is no doubt fatal to the proceedings before the appellate Court and if it was not for that fatal defect I do not think that the learned Judges would have set aside the order of acquittal. In the present case there is no fatal defect whatever

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in the proceedings before the appellate Court which passed the order of acquittal and, therefore, I hold that there is no sufficient ground for interference by this Court in revision with the order of acquittal passed by the appellate Court.

The application is dismissed.

APPELLATE CIVIL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and
Mr. Justice Leach.*

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Aug. 13.

MA HTWE v. MAUNG PU (RECEIVER).*

Insolvency—Order of adjudication based on act of fraudulent preference—Receiver's application to set aside transfer—Transferee's right to show transaction not fraudulent preference—Receiver's application to annul transfer for want of consideration—Rule in Ex parte Learoyd—Provincial Insolvency Act (V of 1920), ss. 53, 54.

An order of adjudication under the provisions of the Provincial Insolvency Act based on an act of the insolvent which the Court holds to be one of fraudulent preference does not preclude the transferee from showing that the transaction did not constitute a fraudulent preference when the Receiver seeks to set aside the transfer under s. 54 of the Act. The order of adjudication does not of itself operate to set aside the transaction. Likewise it is open to the Receiver to prove that there was no consideration and to have the transaction avoided under s. 53 and not under s. 54. Having regard to important differences in the wording of the English Act and the Provincial Insolvency Act the rule in *Ex parte Learoyd*, 10 Ch.D. 3 cannot be applied in a case under the Indian Act.

Official Assignee of Madras v. O.R.M.O.R.S. Firm, I.L.R. 50 Mad. 541—referred to.

S. Datta for the appellant.

N. M. Cowasjee for the receiver.

LEACH, J.—Ma Dwe Hla, the sister of the appellant, was adjudicated an insolvent on the 26th June 1931 under the provisions of the Provincial Insolvency Act. A week before, she had transferred most of her property to the appellant and this was made the basis

* Civil Misc. Appeals Nos. 43 and 45 of 1936 from the order of the District Court of Hanthawaddy in Civil Misc. Case No. 33 of 1934.