FULL BENCH.

Before Tek Chand, Dalip Singh and Abdul Qadir JJ.

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April 27.

DHANPAT RAI (PLAINTIFF) Petitioner

versus

BALAK RAM (DEFENDANT) Respondent.

Criminal Revision No. 970 of 1930.

Criminal Procedure Code, Act V of 1898, Sections 428, 439. Revision—from order of Appellate Court accepting an appeal from an order of a Civil Court refusing to make a complaint—Power of Appellate Court to make a remand or take additional evidence—whether Criminal or Civil Procedure Code applicable.

The following questions were referred for decision to the Full Bench:—

(1) Where a Civil Court refuses to make a complaint and the Appellate Court accepts the appeal, does a revision from the order of the Appellate Court lie to the High Court under Section 115 of the Civil Procedure Code or under Section 439 of the Criminal Procedure Code, or does no revision lie at all?

(2) (*a*) 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?

(*b*) If not, can the Appellate Court take additional evidence itself before deciding whether to make or not make a complaint?

Held by the Full Bench as regards No. (1), that the long standing course of procedure in this Province should not be upset, *viz.*, that in such cases revisions lie to the High Court and lie under section 439 of the Criminal Procedure Code, irrespective of whether the order under revision was passed by a Civil, Criminal, or Revenue Court.

Bishen Singh v. *Amritsaria* (1), followed.

Held as regards 2 (*a*), that the procedure on appeal under section 476-B of the Criminal Procedure Code is procedure on an appeal under that Code, and as that Code provides for

(1) 5 P. R. (Cr.) 1908 (F. B.).

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no remand the Appellate Court cannot make a remand 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.

Held as regards 2 (*b*), that the Appellate Court cannot take additional evidence under section 428 of the Criminal Procedure Code, because that section is specifically limited to appeals under the Chapter in which it occurs, but the Appellate Court can take all evidence necessary for making or completing the preliminary enquiry.

Case law discussed.

Proceedings under Section 193, Indian Penal Code.

J. N. AGGARWAL and R. L. ANAND, for Petitioner.

FAKIR CHAND and CHANDER GUPTA, for Respondent.

The order, dated 10th February 1931, referring the case to a Full Bench.

DALIP SINGH J.—The facts of this case are as follows :— DALIP SINGH J.

One Dhanpat Rai brought a suit against two persons, Balak Ram and Jugal Kishore, for recovery of Rs. 860 principal with interest on the basis of a bond. He also applied for attachment before judgment of the equity of redemption of a certain house, alleging that the defendants had no other property and that they were about to dispose of the equity of redemption and to remove themselves outside the jurisdiction of the Court. The Court ordered security to be taken from the defendants, and if no security was furnished then attachment of the equity of redemption, giving leave to the defendants to put in objections. Security was not furnished, attachment was made and objection was taken by one Bhagat Ram

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who alleged that he had become mortgagee of the equity of redemption on the 13th February, 1930, the very date on which application had been made for attachment before judgment and the order referred to above had been passed. On the 18th of June, 1930, these objections were rejected.

In the meantime the defendants put in a petition asking for the prosecution of the plaintiff on the ground that he had made a false affidavit. On the 7th of March, 1930, the Court dismissed this application holding that there was absolutely no proof on the record to show that the plaintiff's affidavit was false. The defendants then appealed to the learned Senior Subordinate Judge and he held that the trial Court had given no notice to the other side and had given the defendants 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 plaintiff came in revision to this Court and the case was referred by me on the 24th October 1930 to a Division Bench because an objection was raised that the revision is in law on the civil side and not on the criminal side and that the revision put in was not properly stamped. Further, that if the revision was under section 115, Civil Procedure Code, there was no ground for revision. It was further contended that there was considerable conflict of authority and the learned counsel for the petitioner contended

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that in any event the Court had no power to order a remand for fresh enquiry, and incidentally also that the Court could not itself have taken further evidence. I held that the points involved were not free from difficulty, that there had been a change in the law and considerable conflict of authority and that the point was important and therefore referred the case to a Division Bench.

The case has accordingly now been argued before us and it appears that the Full Bench ruling, *Bishen Singh* v. *Amritsaria* (1) of the Chief Court, Punjab, has been followed in this Court throughout and was approved in the ruling reported as *Hari Ram* v. *Emperor* (2), a ruling by a Single Judge of this Court. In that ruling it was stated that the Punjab view had the support of Nagpur Judicial Commissioners and the Bombay High Court, and that while strong arguments might be advanced on either side, there was no reason to change the practice and decision of the Punjab Chief Court. I find, however, that the Nagpur Judicial Commissioners' Court no longer supports the Punjab view. In *Babulal* v. *Emperor* (3), a Division Bench of the Judicial Commissioner's Court held that the previous ruling of the Nagpur Court was wrong and that the view of the Calcutta and Allahabad High Courts was the correct view. Similarly, as regards Bombay I find that in *In re Darsukhram Hurgovandas* (4), the Bombay High Court appears to have followed the Allahabad view. In *Somabhai Valabhbhai* v. *Aditbhai Parshottam* (5), the Court no doubt came to the opposite view, but the

(1) 5 P. R. (Cr.) 1908 (F. B.).
(2) 1929 A. I. R. (Lah.) 676.
(3) (1920) 55 I. C. 286.
(4) (1907) 9 Bom. L. R. 1347.
(5) (1924) 26 Bom. L. R. 289.

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point was not discussed as it was not raised. In *In re Bal Gangadhar Tilak* (1), the matter appears to have been left open as far as I can see, but in any event in view of the remarks in *In re Dalsukhram Hargovandas* (2) the support of Bombay cannot be said to be definite. On the other hand, I find that the Calcutta High Court in *Emperor* v. *Har Prasad Das* (3) has definitely adopted the view that where a Civil Court gives or withholds sanction the appeal is to the Civil Court and the revision, if any, therefrom to the High Court is also on the civil side under section 115 and not under section 439, Criminal Procedure Code. The Allahabad High Court in *In the matter of the petition of Bhup Kanwar and another* (4) and *Salig Ram* v. *Ramji Lal, etc.* (5) has held contrary to the ruling reported as ***Bishen Singh* v.** *Amritsaria* (6). These rulings have been upheld in the latest rulings of that Court, ***Banwari Lal* v.** *Jhunka* (7) and *Abdul Haq* v. *Sheo Ram* (8). The Madras High Court also in a case reported as *Emperor* v. *Karri Venkanna Patrudu* (9) appear finally to have come to the conclusion that the Allahabad view is correct. Similarly *Valab Das* v. *Maung Ba Than* (10) has followed the Calcutta view. *Nawab Ali* v. *Madhuri Saran* (11) has followed the Allahabad view. The Sindh Judicial Commissioner in *Karachi Municipality* v. *Jafferji Tayabji* (12) has also come to the same conclusion and *Ruktu Singh* v. *Emperor* (13), has also agreed with the Calcutta High Court.

(1) (1902) I. L. R. 26 Bom. 785.
(2) (1907) 9 Bom. L. R. 1347.
(3) (1913) I. L. R. 40 Cal. 477 (F. B.).
(4) (1904) I. L. R. 26 All. 249 (F .B.).
(5) (1906) I. L. R. 28 All. 554 (F. B.).
(6) 5 P. R. (Cr.) 1908 (F. B.).
(7) 1926 A. I. R. (All.) 229.
(8) (1927) I. L. R. 49 All. 536.
(9) (1916) 36 I. C. 483.
(10) (1923) I. L. R. 1 Rang. 372.
(11) 1927 A. I. R. (Oudh) 14.
(12) 1927 A. I. R. (Sind) 23.
(13) 1921 A. I. R. (Pat.) 94.

In *Bishan Singh* v. *Amritsaria* (1) I find that considerable stress was laid on the fact that under the old Code, before the change in the law, section 195 was expressly mentioned under section 439. Again in clause (6) of section 195, power was given to the High Court to extend the time and an argument was derived in support of the Punjab view from this fact. Neither of these arguments now exist owing to the change in the law. Their Lordships also held that the weight of authority was in favour of the view that was then taken by the Punjab Chief Court. As I have pointed out the weight of authority is no longer in favour of this view.

There then remains the general argument of the Punjab Chief Court that public policy demands that the action of the Courts as regards prosecutions should be subject to check or control, and that if the Civil Procedure Code were to apply, the powers of interference would be considerably limited. This argument no doubt still remains but seems to me a very dangerous argument, for it would imply that wherever a right of the subject was involved there would be a presumption that the High Court had some power of interference whatever might be the conclusion to be derived from the law as it stood. Since the change in the Act an appeal has been given under section 476-B, and it seems to me that the Legislature might well have thought that the conferring of the right of appeal was sufficient or adequate protection of the subject. Therefore, if the matter was *res integra*, I should feel inclined to hold that the proceedings under section 476 would be civil or criminal or revenue proceedings according to the Court

(1) 5 P. R. (Cr.) 1908 (F. B.).

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in which the proceedings have taken place. It seems to me that what the Court decides in a proceeding under section 476 is whether to make a complaint or not and that therefore there is no necessity to assume that the Court acts either criminally or *quasi*-criminally. On the other hand of course there is no force in the argument that as the Court's action removes a bar to prosecution the proceedings should be taken to be criminal or *quasi*-criminal. On the whole I should have been inclined as at present advised to hold that the Allahabad view is correct, but in view of the Full Bench decision of the Punjab Chief Court and the decision of the learned Judge in *Hari Ram* v. *Emperor* (1) and the practice of this Court, and as the point is not free from difficulty, I would refer the question to a Full Bench for decision.

On the second point involved in the case, there is again conflict of authority as to whether the Court in appeal could order a remand or could take fresh evidence itself. In the case in question there can be no doubt that the facts which would show the falsity or otherwise of the plaintiff's affidavit could not possibly be on the record already and an enquiry would have been necessary if the Court were really to decide on the matter. In *Sami Vannia Nainar, etc.* v. *Penasami Naidu, etc.* (2), *Krishna Reddy, etc.* v. *Emperor* (3) and *Rama Aiyar and another* v. *Venkatachella Padayachi* (4), it appears to have been held that the Court could not order a remand or take further evidence. On the other hand in *Nasaruddin Khan* v. *Emperor* (5) and *Mahendra*

(1) 1929 A. I. R. (Lah.) 676.
(2) (1928) I. L. R. 51 Mad. 603.
(3) (1910) I. L. R. 33 Mad. 90.
(4) (1907) I. L. R. 30 Mad. 311.
(5) (1926) I. L. R. 53 Cal. 827.

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Nath Das, etc. v. *Emperor* (1), it appears to have been held that the remand could take place and that fresh evidence could also be taken. It seems to me extremely difficult to see if the proceeding before the Court is held to be under the Civil Procedure Code, why there should not be power of remand and taking of additional evidence in the Court. But even if it be held that the procedure is governed by the special powers given under section 476, Criminal Procedure Code, it seems to me that under section 476 a discretion is conferred on the trial Court to hold or not to hold a preliminary enquiry. It seems to me to follow that the Appellate Court has an inherent power to see if this discretion has been rightly or wrongly exercised. That being so it would follow that the Appellate Court would have power, if it came to the conclusion that the discretion had not been properly exercised, to direct the lower Court to exercise that discretion in the correct manner, and from this would be implied at once both the power of remand and a right to take additional evidence.

In view, however, of the conflict of authority on the point, I refer this question also to the Full Bench and the questions may be formulated as follows:—

1. Where a Civil Court refuses to make a complaint and the Appellate Court accepts the appeal, does a revision from the order of the Appellate Court lie to the High Court under section 115 of the Civil Procedure Code or under section 439 of the Criminal Procedure Code, or does no revision lie at all.

2. (*a*) Can the Appellate Court order a remand and direct the trial Court to make a preliminary en-

(1) 1929 A. I. R. (Cal.) 428.

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quiry and come to a fresh decision on the question of making or not making a complaint.

(*b*) If not, can the Appellate Court take additional evidence itself before deciding whether to make or not to make a complaint.

ABDUL QADIR J. ABDUL QADIR J.—I agree with my learned brother in referring to a Full Bench the two questions formulated above, in view of their importance, as well as the conflict on the point between the view taken by this Court so far and the view as it now seems to prevail in other High Courts.

JUDGMENT OF FULL BENCH.

DALIP SINGH J. DALIP SINGH J.—The questions referred to the Full Bench for decision were formulated in my referring order as follows:—

1. Where a Civil Court refuses to make a complaint and the Appellate Court accepts the appeal, does a revision from the order of the Appellate Court lie to the High Court under section 115 of the Civil Procedure Code, or under section 439 of the Criminal Procedure Code, or does no revision lie at all?

2. (*a*) 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?

(*b*) If not, can the Appellate Court take additional evidence itself before deciding whether to make or not make a complaint.

Before proceeding to state the answer to be given to these questions, I should like to point out that there is a mistake in my referring order as to the view of the Bombay High Court and the Court of the

Sind Judicial Commissioners. *In re Dalsukhram Hurgovandas* (1), which is cited in the referring order as following the Allahabad view, is not a case under section 476. In *In re Bal Gangadhar Tilak* (2), it is stated that there was no conflict in the different High Courts on the question at all, that is to say, the Bombay High Court appear to hold that section 439, Criminal Procedure Code, governs the revision in the High Court. Towards the close of that judgment, however, there were certain remarks which might be said to throw some doubt on the authority of that ruling. Similarly, *Karachi Municipality* v. *Jafferji Tayabji* (3) was not a ruling under section 476-B. at all and in *Gerimal* v. *Shewaram* (4), a Division Bench of the Sind Court holds that a revision lies under section 439. The point is of little importance, for it is clear enough that the weight of authority is now on the side of the Allahabad view, for the High Courts of Calcutta, Madras, Rangoon and Patna have followed the Allahabad view, as also the Court of the Judicial Commissioners, Nagpur.

Passing now to the merits of the question, the matter really turns on the answer to the question whether section 439 is dependent on, and should be read along with, section 435, or is wider than, or independent of, that section. There is much to be said on both sides on general considerations. There is also much to be said on both sides on a consideration of the language of the section itself. On the one hand it can be argued that as a right of appeal is given under the Criminal Procedure Code, the right of revision must similarly be under that Code. On

(1) (1907) 9 Bom. L. R. 1347.
(2) (1902) I. L. R. 26 Bom. 785.
(3) 1927 A. I. R. (Sind) 23.
(4) (1926) 95 I. C. 316.

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the other hand, it can be contended that the Court that makes a complaint does not become a Criminal Court, and, therefore, as a right of appeal is vested in the Court to which that Court is ordinarily subordinate in its ordinary jurisdiction, procedure is governed by civil, criminal or revenue procedure according as the Court is a civil, criminal or revenue Court.

Looking to the language of the section, on the one hand, it can be argued that while section 435 definitely specifies an "inferior criminal Court," section 439 does not do so and, therefore, the words "any proceedings" in section 439 refer to any Court acting under the Criminal Procedure Code. On the other hand, it can be contended that had the Legislature intended to give any such special jurisdiction to the criminal side of the High Court, it should have done so more specifically than by the mere omission of certain words, which omission is explainable on other grounds.

To my mind, if the matter were *res integra*, as indicated in the referring order, I would have come to the conclusion that the Allahabad view was the correct one. But I am constrained by an argument which, on the somewhat balanced contentions that can be urged on either side, should, I think, prevail and that is that the procedure of this Court has for a large number of years now assumed that in such revisions section 439 applies, and I do not think that the matter is so clear that that long standing course of procedure should be upset now. I would, therefore, answer the first question referred to the Full Bench by holding that revisions lie to the High Court and lie under section 439 of the Criminal Procedure Code in all cases whether the Court be a civil, criminal or revenue Court.

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As regards 2 (*a*) it would seem to me to follow almost logically that if the revision lies under section 439 of the Criminal Procedure Code, the procedure on appeal under section 476-B must be procedure on an appeal under the Criminal Procedure Code. It follows, therefore, that as that Code provides for no remand, the Appellate Court cannot make a remand to the trial Court, but I would add that it seems clear to me that 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. This power would seem to me to follow from the power given to the Appellate Court to make or not make a complaint itself or to withdraw a complaint already made.

As regards 2 (*b*), subject to what has been stated above, the Appellate Court could not take additional evidence under section 428 of the Criminal Procedure Code because that section is specifically limited to appeals under the chapter in which it occurs, but the Appellate Court could take all evidence necessary for making or completing the preliminary enquiry.

TEK CHAND J.

TEK CHAND J.—I agree in the answers proposed by my brother Dalip Singh. I think that the reasons given in the Full Bench decision of the Chief Court in *Bishan Singh* v. *Amritsaria* (1), and the dissenting judgment of Banerji J. in *In the matter of the petition of Bhup Kanwar and another* (2) have not been met in any of the judgments delivered subsequently in the various High Courts. The amendment of the Code made in 1923, instead of weakening the argument in

(1) 5 P. R. (Cr.) 1908 (F.B.). (2) (1924) I. L. R. 26 All. 249 (F. B.).

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support of the applicability of section 439, Criminal Procedure Code, has in my opinion strengthened it. The Bombay and the Sind Courts decidedly favour the view adopted in the Punjab, and in the other Courts also, it cannot be said that the opposite view is accepted without demur. At Allahabad, Mukerji J. in Criminal Revision No. 428 of 1924 expressed the opinion that the earlier view of that Court required reconsideration, and accordingly he referred the matter to a Division Bench, but the case was eventually decided on other grounds. In *Banwari Lal* v. *Jhunka* (1), Sulaiman J. felt the force of the argument, that section 439 was wider in scope than section 435, that the word " proceeding " in section 439 might possibly mean " any proceeding to which the Code of Criminal Procedure is applicable, and that if that was so the High Court would perhaps have the power of revision under section 439." But he did not think it proper to pursue the matter further in view of the former Full Bench decision. In *Abdul Haq* v. *Sheo Ram* (2), Ashworth J. observed that the Legislature, when drafting section 476 " doubtless considered that sections 436 to 439 of the Code of Criminal Procedure would operate to afford means whereby the High Court could set aside such an order, but unfortunately by reason of the Full Bench decision of this Court it is not sections 435 to 439 of the Code of Criminal Procedure that will govern such an application in revision, but section 115 of the Code of Civil Procedure."

With this expression of opinion the learned Judge left the matter where it was.

In Madras, while the prevailing view is that revision lies under section 115, Civil Procedure Code,

(1) 1926 A. I. R. (All.) 229. (2) (1927) I. L. R. 49 All. 536, 539.

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it has been recently held that the procedure to be followed in appeals under section 476-B, is the one laid down by the Code of Criminal Procedure [*Sami Vannia Nainar, etc.* v. *Penasami Naidu, etc.* (1)]. If this be correct, there seems force in the argument that the power of the High Court to examine the legality or otherwise of that procedure should be regulated by that Code and not by the Code of Civil Procedure.

In Calcutta also, while *Emperor* v. *Har Prasad Das* (2) still holds the field, revisions are sometimes entertained on the criminal side [see for instance, *Jagabandhu Chawdhuri and another* v. *Abdul Sabhan Sarkar* (3)]. Again judicial opinion in that Court is not uniform as to whether civil or criminal procedure is to be followed by the Appellate Court while acting under section 476-B. In *Hamid Ali* v. *Madhu Sudan Das Sarkar* (4), the two Judges composing the Bench were not agreed on the point, the senior Judge (Chotzner J.) favouring the former view while his colleague (Duval J.) the latter. There is also a divergence of opinion in these Courts as to whether transfer applications in such cases are to be governed by section 24 of the Civil Procedure Code or section 476, Criminal Procedure Code. In these circumstances, I do not see any adequate ground for making a departure from the view which has consistently prevailed in this province for the last fifty years.

ABDUL QADIR J.

ABDUL QADIR J.—I agree with the conclusion arrived at by my learned brothers and generally with the reasoning adopted by Tek Chand J.

A. N. C.

(1) (1926) I. L. R. 51 Mad. 603.
(2) (1913) I. L. R. 40 Cal. 477 (F. B.).
(3) 1929 A. I. R. (Cal.) 480.
(4) (1927) I. L. R. 54 Cal. 355.