

When the simple question arises as to whether the equity of redemption, when the property is in the possession of the mortgagee, could form the subject-matter of a valid gift according to Mahomedan law, these decisions would require to be carefully considered probably by a Full Bench. But on the facts such as we have in this case, viz., that the possession of a part of the property given by way of gift was transferred to the donee, and that as regards the rest, the donee in fact got possession from the mortgagee after the donor's death in pursuance of the gift, I feel clear that the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

The decree of the lower appellate Court should be reversed and that of the trial Court restored with costs here and in the lower appellate Court on the defendants.

MACLEOD, C. J. :—I agree.

Decree reversed.

J. G. R.

CRIMINAL APPELLATE.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SOMABHAI VALLABHAI (ORIGINAL APPLICANT), APPELLANT *v.* ADIT-BHAI PARSHOTAM AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS*.

1924.

February 27.

*Criminal Procedure Code (Act V of 1898), sections 476, 476B, 480—
Direction to prosecute set aside by lower appellate Court—No appeal lies to High Court—High Court will not ordinarily interfere in revision—Form of order.*

* Criminal Appeal No. 128 of 1924.

1924.

 HASHIMBI
 v.
 AJAMATBI.

1924.

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PARSHOT-
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An order passed by a lower appellate Court under sections 476B of the Criminal Procedure Code is not appealable to the High Court. Nor will the High Court ordinarily interfere in revision with such an order where it withdraws a complaint under section 476 of the Code.

Under section 476 as amended the Court is directed to make a complaint in writing signed by the presiding officer of the Court and forward the same to a Magistrate of the first class having jurisdiction.

Where a Court quashes a direction to prosecute, it should direct withdrawal of the complaint. It is not enough to direct that sanction granted by the trial Court is withdrawn.

THIS was an appeal from an order passed by G. D. Madgaonkar, Sessions Judge of Ahmedabad, setting aside a direction to prosecute granted by B. M. Butti, Subordinate Judge at Umreth.

The Subordinate Judge of Umreth granted, on the application of Somabhai, a direction to prosecute the respondents, under section 476 of the Criminal Procedure Code. It was in following form :—

“ I direct that the opponents should take their trial before the Court of the First Class Magistrate, Nadiad, for offences under sections 193, 465, 471 and 209 of the Indian Penal Code and abetment of these offences. Each of the opponents to give personal recognizance of Rs. 500 for his appearance before the said Magistrate.

The Sessions Judge of Ahmedabad, on appeal, reversed the order and directed that “ the sanction against them be withdrawn ”.

The applicant appealed before the High Court.

The appeal was heard for admission by Macleod, C. J., and Shah, J.

G. N. Thakor, instructed by *Amin and Desai*, for the appellant.

MACLEOD, C. J.:—The petitioner in this case prayed for an inquiry under section 476, Criminal Procedure Code, into offences alleged to have been committed by the opponents under sections 193, 209, 465, 471 and 114,

Indian Penal Code. The Subordinate Judge, after holding an inquiry, directed that the opponents should take their trial before the Court of the First Class Magistrate of Nadiad for offences under sections 193, 465, 471 and 209, Indian Penal Code. The Subordinate Judge did not comply with the provisions of section 476 of the amended Criminal Procedure Code, by which the Court is directed, in case it thinks that proceedings should be taken, to make a complaint in writing signed by the presiding officer of the Court and forward the same to a Magistrate of the first class having jurisdiction.

Against the order of the Subordinate Judge, dated 29th September 1923, an appeal was filed to the Sessions Judge of Ahmedabad under section 476B, Criminal Procedure Code. The Judge allowed the appeal and directed that the sanction against the appellants should be withdrawn. There again the learned Judge has not followed the provisions of section 476B because he should have directed withdrawal of the complaint.

From that order in effect directing withdrawal of the complaint the petitioner has filed an appeal. The first question is whether the appeal lies. We are clearly of opinion that no appeal lies under the provisions of the Code against an order made by the Court to which the Court making a complaint is subordinate.

The only question is whether we should entertain an application in revision under section 439, Criminal Procedure Code. It must be noticed that section 439 of the amended Code makes no mention of section 195, Indian Penal Code, which was referred to in section 439 before the Code was amended. Therefore, unless we take a very wide view of our powers under section 439, it would not be competent to this Court to revise an order such as the one made in this case. At the same time we are not anxious to lay down any such principle which would prevent us from exercising revisional

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powers, in extraordinary cases, although, generally speaking, where the lower appellate Court has thought fit to withdraw a complaint made under section 476, it would be very difficult for this Court to interfere in revision. I think that the question whether a complaint should be made under section 476, Criminal Procedure Code, is almost invariably a matter of discretion, and if the trial Court or a Court to which it is subordinate thinks that no complaint should be made, then it would not be desirable that this Court should interfere. In any event in this case the Sessions Judge has considered that no complaint should be made, and we are not disposed to interfere with that order.

Appeal dismissed.

R. R.

PRIVY COUNCIL.

J. C.*

MAHOMED RAHIMTULLA (DEFENDANT NO. 1), APPELLANT v. ESMAIL
ALLARAKHIA (CLAIMING UNDER PLAINTIFF), RESPONDENT.

1924.

March 13.

[On Appeal from the High Court at Bombay.]

Payment out of Court—Conditional decree for possession—Payment in by mortgagee not a party to suit—Right of withdrawal—Interests of other persons.

In 1918 the son and daughter of a deceased Mahomedan obtained a decree, conditional upon paying a sum within six months, for possession of immovable property part of their father's estate which their mother had sold in 1907 after his death. The appellant had bought in 1911 from the purchaser. In 1915 the son had mortgaged his interest to D, who was not a party to the suit in which the decree of 1918 was made. Shortly after the decree the respondent bought the entire interest of the plaintiffs, the son and the daughter, excepting a fractional share previously sold. In order to prevent the decree from becoming inoperative D, before the expiration of the six months, paid the money into Court; upon his mortgage being redeemed he applied in October 1918 to withdraw the money. The application was opposed by the appellant.

* *Present.*—Lord Shaw, Lord Blanesburgh, Mr. Amcer Ali and Lord Salvesen.