

Manni Lal Vs. Emperor

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Court : Allahabad

Decided On : Jan-07-1937

Reported in : AIR1937All305

Appellant : Manni Lal

Respondent : Emperor

Judgement :

Sulaiman, C.J.

1. The question that arises in this case is whether the language of the various provisions of the Code of Criminal Procedure justify an inference that an appellate Court when hearing an appeal under Section 476-B has the power to remand the case for further evidence to be taken or itself take further evidence. Before 1923 when the previous Code of Criminal Procedure was in force, there was no appeal provided from an order under Section 476-B, Criminal P.C. The Legislature apparently thought that when there is a question whether prosecution should be ordered or not, the first Court which had examined the entire evidence should be the sole Judge. It is not necessary that there should be a right of appeal in every case, particularly when there is no final order convicting or acquitting the accused but merely a complaint in a case fit for further enquiry. The policy was somewhat changed by the amendment of 1923, while sanction to a complainant has been abolished, a right of appeal has been given. Now the Legislature might think that the appellate Court should have all powers for taking fresh evidence for remanding

the case, for ordering a re-trial, etc. or it may consider that as the question is merely one of filing a complaint; in a criminal Court or withdrawing such a complaint, the appellate Court should not possess the widest powers, but its final opinion should be confined to the evidence and materials already on the record. I do not think that either view is necessarily absurd. One has therefore to see whether all the powers have been conferred on the appellate Court.

2. There has undoubtedly been a great conflict of opinion in the various High Courts. Some Judges have held that the appellate Court's powers are strictly restricted, and others have said that the powers are wider; but the Judges who have taken the view that the appellate Court has wider powers have felt considerable difficulty in finding the true basis for it and in relying on particular sections of the Code. The shortest out has been adopted by some Courts which have held that an appellate Court has an inherent power to make any order it thinks just and that accordingly it can do anything it thinks fit. It has been held by a Division Bench of the Madras High Court in *Ramayya v. Emperor* : AIR1933 Mad67 , following an earlier case of that Court that the appellate Court has power of remand and also summary dismissal in such cases. A somewhat similar view has been expressed by a Division Bench of the same Court under the old Code in *Subbasari v. Emperor* A.I.R. 1921 Mad. 453. With great respect, I do not think that an appellate Court can invoke the aid of its inherent jurisdiction in ordering a subordinate Court to do something in a case. In the first place, new categories of inherent jurisdiction should not be invented; particularly if prior to 1923 no appeal was at all permissible. In the second place, the inherent jurisdiction is generally confined to the proceedings before the appellate Court and does not include an authority to issue orders to the Court below directing it to do something in the case. If such inherent powers were invoked, then the provisions of the Code would become quite unnecessary. Before examining the provisions of Section 476 itself, it may be convenient to consider whether the other sections of the Code at all apply. The order of the learned Sessions Judge is in the following words:

I return the case to the learned Magistrate, who will take evidence on this question whether there were two separate Mohammad Ishaqs or they were one and the same, and will then prosecute or refrain from prosecuting on a consideration of

this evidence.

3. It seems to me that on the merits themselves the order is not correct. A mere finding as to whether there were two separate Mohammad Ishaqs or only one may not be absolutely conclusive, unless the learned Judge intended that if it were established that there were two Mohammad Ishaqs, then there would be some doubt and he would not make the complaint. It seems that the existence of two Mohammad Ishaqs was perhaps admitted by the opposite party. It was the identity of the person which was in question. Now the power to order enquiry is conferred on a Sessions Judge by Section 436, Criminal P.C. That section is limited to particular cases mentioned therein; and therefore the authority conferred by it cannot be exercised when dealing with other cases. I am quite unable to hold that the learned Sessions Judge had any power to order inquiry under this section when he is hearing an appeal under Section 476-B.

4. We next come to Ch. 31 of the Code, as to the applicability of which there is a wide divergence of opinion in the various High Courts. Now Section 404 refers to appeals from any judgment or order of a criminal Court, except as provided for by this Code or by any other law for the time being in force. Thus there are three classes of appeals contemplated namely : (a) appeals under Ch. 31; (b) under other sections of the Code; and (c) by any other law. But all such appeals are appeals from either judgment or order, and of a criminal Court, and not of a civil or revenue Court. Some of the sections of Ch. 31 are no doubt generally worded and it may well be urged that they are applicable to all classes of appeals. Thus I need not for the present quarrel with the view taken in Patna and Calcutta that Section 421, Criminal P.C., applies to appeals under Section 476-B also see *Baidyanath Gird v. Emperor* A.I.R. 1931 Pat. 144 and *Mahomed Boyetulla v. Emperor* : AIR1931 Cal3 .

5. The next question is whether Section 428, Criminal P.C., can apply to an appeal under Section 476-B. The opening words of the section are 'in dealing with any appeal under this chapter'. Those words to my mind clearly show that the section refers to appeals under this chapter; and there are several sections in this chapter which provide for such appeals. That section in terms would not be applicable to

an appeal which is filed under some other chapter of the Code. It is significant that only two sections, namely Sections 428 and 431 contain the words 'appeal under this chapter' and no other section of Ch. 31 contains such words. I am therefore of the opinion that the Legislature has advisedly used these words in these two particular sections in order to restrict the scope of these sections and has not used those words in the other sections of this chapter. Now an appeal under Section 476-B is provided therein and is not an appeal under Ch. 31 at all. I am therefore strongly of opinion that Section 428 cannot apply. On this point there is undoubtedly a preponderance of authority. It has been held by the Full Bench of the Lahore High Court in *Dhanpat Rai v. Balak Ram Ram* A.I.R. 1931 Lah. 761, *Mendi Lal v. Ram Adhin* A.I.R. 1935 Oudh 59, and *Krishna Reddy v. Emperor* (1910) 33 Mad. 90, that Section 428 applies to an appeal under Ch. 31 only, and not to appeals under other sections of the Code.

6. It may here be pointed out that there are order sections outside Ch. 31 which also provide for appeals. Section 250, Sub-section (3) allows an appeal from an order under that section, but does not lay down any procedure for such appeals. Similarly Section 443, Sub-section (2) allows an appeal and lays down no particular provisions with regard to it. Again Section 515 makes orders passed under Section 514 appealable, but lays down no special provisions for appeals. On the other hand, Section 486, which occurs in the same Ch. 35 in which Section 476 occurs, also provides for an appeal and contains a special Sub-section (2) to the effect that:

The provisions of Ch. 31 shall, so far as they are, applicable, apply to appeals under this section, and the appellate Court may later on reverse the finding, or reduce or reverse the sentence appealed against.

7. This shows, to my mind, that the Legislature thought that but for this Sub-section (2), the provisions of Ch. 31 would not have been applicable; and the Legislature there, fore thought it necessary to make a special provision applying that chapter to appeals under this section. The Legislature has however refrained from laying down a similar provision in Section 476. We next come to Section 423. It first gives an appellate Court power to dismiss the appeal. That portion is

general and it may well be argued that it applies to Section 476 as well. But it lays down four categories of orders which it can pass : (a) Applies to cases where there is an appeal from an order of acquittal. (b) Applies to cases where there is an appeal from a conviction. It seems to me that neither of these two categories can apply to appeals under Section 476 as there has neither been an acquittal nor conviction, (c) Applies to appeals from any other order. In the first place, I am not prepared to hold that when a complaint has been made by the first Court under Section 476, it has made any 'order' at all. The word 'order' is not mentioned in Section 476. All that it says is that a Court may record a finding and make a complaint. I am therefore not prepared to hold that the recording of a finding or the making of a complaint under Section 476(1) amounts to an 'order' within the meaning of Section 423(e). In the second place it is significant that the power of the appellate Court under (c) is very much restricted. It can only alter or reverse such order. In the earlier categories (a) and (b) the Court could not only reverse or alter the order, but could also direct that the accused be re-tried or committed for trial. There is no such analogous provision in (c). The section does not say that the Court may alter or reverse such order and direct the original Court to enquire into the matter afresh or start proceedings de novo. I am therefore unable to read in (c) a power to order a fresh enquiry. That sub-section deals with the powers of the appellate Court and lays down what it itself can do and does not provide that it can order the subordinate Court also to do something other than what it has already done. Lastly (d) authorizes the Court to make any amendment or any consequential or incidental order that may be just or proper.

8. I am unable to hold that ordering a fresh enquiry or taking fresh evidence amounts either to 'amendment' of any order or any 'consequential' or 'incidental' order. They, to my mind, refer to orders which the appellate Court would necessarily or as a matter of course pass, for instance, on acquittal; it may order that the fine if paid be refunded or it may pass an order under Section 516-A regarding the disposal of property and so on. Had it been intended that these words are wide enough to cover the case of ordering fresh enquiry de novo, then there would have been no need to mention a re-trial in (a) and (b) because such a power would have been already covered by (d). It seems to me that when in (a) and (b) there is a special provision for ordering re-trial, then that provision is not

intended to be included in the consequential or incidental order mentioned in (d), much less would I hold that this includes a power to take fresh evidence. If that were so, there would be no need to make a special provision for it in Section 428, and to restrict it to appeals under Ch. 31; I therefore think that it would be straining the language of these sub-sections to hold that an appellate Court when acting under Section 476-B can invoke the powers conferred on the appellate Court when hearing an appeal from acquittal or appeal from conviction or appeal from any other order. I therefore regret that I am unable to agree with the view expressed in *Surendranath maiti v. Sushil Kumar Chakravarti* : AIR1931 Cal604 that an appellate Court under Section 476-B has ample power to remand the case for further enquiry. We now have to examine the language of Section 476 itself in order to see whether that section confers any such powers. It has already been pointed out that although Sections 476 and 486 occur in the same Ch. 35 and provide for appeals, the Legislature has taken special care to provide in Section 486(2) that:

The provisions of Ch. 31 shall, so far as they are applicable, apply to appeals under this section.

9. It has deliberately refrained from adding any such sub-section to Section 476. The obvious reason is that Section 486 does not lay down any special procedure for appeals, whereas Section 476 does. It therefore seems to me that the Legislature intended that Section 476 should be self-contained. The obvious reason is that there is no finality in Section 476. Either a complaint is filed in which case the criminal Court will investigate the matter and pass final orders; or the Court has merely declined to take any steps for prosecution, not considering it to be a fit case, in which case there may not be any serious wrong. The first point to note about Section 476 is that it applies not only to criminal Courts but also to civil and revenue Courts. It would be inappropriate to make Ch. 31 applicable to a civil or revenue Court, which are governed by a separate Code. It is therefore only proper that Section 476 should be self-contained and the appellate Court when acting under it should not have to rely on any chapter applicable specially to criminal Courts, which is not applicable to such civil or revenue Courts. I would therefore expect to find in Section 476 a complete provision defining the powers of

first as well as appellate Court. The second thing to note is that Sub-section (1) really consists of two parts, the first dealing with the recording of a finding to the effect that it is expedient in the interests of justice that an enquiry should be made and making a complaint thereof. The second portion deals with what is to happen when it makes a complaint. The Court then is to forward the complaint signed by it to a Magistrate and may take sufficient security for the appearance of the accused and send the accused in custody to such Magistrate and may bind over any person to give evidence before such Magistrate. Sub-sections (2) and (3) provide what the Magistrate is to do when such complaint is received. It is necessary to bear in mind these two parts of Sub-section (1) as their relevancy would be apparent when we examine the next sections. It is further necessary to bear in mind the fact that in the first part of Sub-section (1) power to make a preliminary enquiry before the finding is recorded is expressly conferred. The first part deals with the proceedings up to the making of the complaint, and the second part with the proceeding consequent thereupon. Section 476-A deals with a case where the first Court has neither made a complaint nor rejected any application for making such a complaint. The matter therefore comes up almost for the first time before the superior Court. There has been no definite order passed so far. It is the appellate Court which is to pass a definite order for the first time. The opening provisions as well as the concluding provisions of the section are noteworthy. The opening provisions lay down that the power conferred by Section 476, Sub-section (1) may be exercised by such superior Court. The concluding portion provides:

Where the superior Court makes such complaint, the provisions of Section 476 shall apply accordingly.

10. The opening portions confer jurisdiction on the superior Court and invest it with all powers which can be exercised under Section 476(1) without any exception. The concluding portions, on the other hand, refer to the provisions of Section 476 where the superior Court makes such complaint. The last words do not say that the superior Court is to make an inquiry. It therefore follows to my mind that the concluding portion deals with the provisions of Section 476(1) contained in the second part of it and to (2) and (3) which come into operation when the complaint is made. As regards the second portion, there no longer is any question of any

preliminary inquiry. It follows that under Section 476-A the Court's powers to make an inquiry and then to record a finding and then make a complaint are conferred upon it by virtue of the opening words which refer to Section 476, Sub-section (1) and not by virtue of the concluding words which say that the provisions of Section 476 would be applicable where the Court makes a complaint. The power of the Court to make an enquiry, record a finding and make a complaint is one thing and the applicability of Section 476 where a complaint is made, is another thing. The next important thing is that Section 476-B applies to cases where a superior Court hears an appeal. That is an occasion where the matter has already been considered by the original Court and comes up for reconsideration before a higher Court. The Legislature has refrained from reproducing the opening words of Section 476-A in the section. There are no words which say that the appellate Court shall exercise the powers conferred by Section 476, Sub-section (1) as Section 476-A provides. It is altogether silent regarding this. On the other hand, it repeats the concluding words of Section 476-A and provides that and if it makes such complaint, the provisions of that section shall apply accordingly.

11. It seems to me that these provisions relate to the proceedings consequent upon the making of the complaint and not to those antecedent to it. They cannot therefore cover the power to make an inquiry which must precede the making of the complaint. I am unable to hold that the words 'if it makes such complaint' must be interpreted as meaning while it is considering whether it should or should not make a complaint. The words to my mind mean where it finds that it should make a complaint, i.e. has decided to make a complaint. Nor do I think that the words, 'itself make the complaint which the subordinate Court might have made under Section 476' include the power to take fresh evidence in appeal in the form of another inquiry. That sentence refers to the making of the complaint which the original Court would have done and not to the making of a preliminary inquiry or taking fresh evidence. Section 476-B confers limited powers on the superior Court, namely

may thereupon, alter notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, itself make the complaint etc.

12. That is to say, it has power of reversal and can withdraw a complaint where the subordinate Court has made it, or can make a complaint itself when the subordinate Court has not done so. Those words, in my opinion, do not indicate that the appellate Court should hold another inquiry, take fresh evidence and then after weighing such evidence come to a different conclusion. The idea seems to be that the superior Court should revise the opinion of the subordinate Court on the materials as they are on the record. Had it been intended that the appellate Court should have all the powers conferred on such Courts by Ch. 31, one would have expected to find the opening words of Section 476-A reproduced or a subsection added to it as in Section 486. After all, the superior Court is not to record a final finding as to the guilt or innocence of the accused. It has merely to see whether there is a prima facie case for an inquiry by a criminal Court. For such purposes the materials on the record may well be sufficient.

13. In some cases much emphasis has been laid on the omission in Section 476-B of words indicating that the Court may summarily dismiss the appeal without issuing notice. I quite agree that where the Court is prepared to dismiss the appeal summarily, it need not issue notice to the opposite party. The words 'may thereupon, after notice to the parties concerned etc.' mean that notice is necessary only where the Court is going to reverse the decision. The meaning would have been different, if the words had been 'after notice to the parties concerned, may direct the withdrawal etc.'. I do not think that the words as they stand make it incumbent upon the appellate Court to issue notice to the opposite party even where it is prepared to dismiss the appeal summarily. It seems to me that when the reversal of the order of the subordinate Court is discretionary, as the word 'may' indicates, the power of dismissing the appeal is necessarily implied in Section 476. But even if such power were not implied in this very section, then by a stretch of the language Section 421 can be made applicable to it, and even the opening words of Section 423 may be applied because these provisions are not confined to appeals under Ch. 31, nor in fact even to appeals from an 'order'. But personally I am of the Opinion that the power of summary dismissal is necessarily implied in Section 476-B when it is made optional to the superior Court to reverse the order or not.

14. If we were to hold that Section 476 is not self-contained, and Ch. 31, Criminal P.C., is ipso facto applicable because an appeal has been preferred from a criminal Court, it may follow that, in the case of an appeal from a civil Court, Order 41, Civil P.C., would be automatically applicable and another appropriate procedure in the case of an appeal from a revenue Court. If Order 41, Civil P.C. were to be applicable, provisions for the demanding of security for costs and other incongruent provisions like sending down an issue and the addition of parties may have to be invoked in it. Again, different High Courts would from time to time amend the rules and change the provisions. I very much doubt if the Legislature intended that an appellate Court hearing an appeal under Section 476-B should have different powers accordingly as if is hearing an appeal from a subordinate criminal, civil or revenue Court. As Section 476 is applicable to all such Courts, there is all the greater reason that it should be self-contained, and not stand in need of being supplemented by other provisions of the Code of Criminal Procedure.

15. It is open to the appellate Court when it finds that the subordinate Court has not made a proper enquiry to report the matter to the High Court on its revisional side and in such special cases the High Court can pass any orders that it considers just and fit. In such cases the High Court would have before it the opinion of the first Court as well as of the appellate Court and would be able to decide whether fresh evidence should be taken or not and whether a fresh enquiry should or should not be ordered. In my opinion, Section 439, Cr.P.C., is very wide in its scope and confers upon the High Court all powers which are conferred on a Court of appeal by Sections 423, 426, 427, 428 and also 338. When a revision comes up before the High Court, there is no appeal from an order of acquittal, nor is there any appeal from an order of conviction, nor necessarily an appeal from any other order as a revision may be from a 'case' or any 'proceeding'. In such a revision the High Court is entitled to exercise all the powers conferred under (a), (b), (c) and (d) of Section 423, although it is really not hearing any appeal at all. That this is so, is obvious from the fact that Section 439, Sub-section (4) lays down that the High Court shall not convert a finding of acquittal into one of conviction. This provision implies that, but for this exception, the Court in revision would have exercised the power conferred on an appellate Court in an appeal from an order of

acquittal as well. I have therefore no hesitation in saying that the High Court on its revisional side has all such implied powers. The appellate Court can refer the matter to the High Court, and the High Court on a consideration of the report and hearing the parties concerned, if necessary, can pass any order that it thinks fit. I am therefore of the opinion that by enacting Section 476-B the Legislature did not intend to confer on the appellate Court the powers conferred by Sections 423 and 428, Criminal P.C.

16. Apart from specific provision there is no general power vested in an appellate Court to admit fresh evidence. This is negated by the ruling of their Lordships of the Privy Council in *Parsotim Thgakur v. Lal Mohar Thakur*. It must, however, be conceded that Section 540 occurs in this Code and empowers any Court at any stage of a proceeding to summon any person and examine him as a witness. There is certainly nothing in the language of this section which would prevent an appellate criminal Court hearing an appeal under Section 476-B from examining a witness under this section. I am therefore prepared to hold that the learned Sessions Judge would have power under this section to examine witnesses if he so liked; but, in my opinion, he had no jurisdiction to return the case to the Magistrate with direction to take evidence and then to dispose of the matter afresh.

Niamatullah, J.

17. Two questions have been referred to this Pull Bench. The first is, whether a Court hearing an appeal under Section 476-B, Criminal Procedure Code, can take evidence for a proper decision of the appeal before it, and the second is whether it can set aside the order of the Court of first instance making a complaint or refusing to make one, and remand the case to that Court for further evidence being taken and the case being decided afresh. It is contended by learned Counsel for the applicant that the appellate Court can do neither. If these questions have to be answered on the language of Sections 476, 476-A and 476-B, Criminal P.C. there is no doubt that a good deal can be said for and against the view contended for; but in my opinion those sections should be taken with other parts of the Criminal Procedure Code or the Civil Procedure Code, whichever may be applicable according as the case arises from criminal or civil proceedings.

18. Section 476, Criminal P.C., empowers a civil, revenue or criminal Court, where it is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in Section 195 (1), Clause (b) or Clause (c), which appears to have been committed in or in relation to a proceeding in that Court, to record a finding to that effect after such preliminary enquiry as it may think necessary and, to make a complaint thereof in writing. The section also empowers the Court to take sufficient security for the appearance of the accused before a Magistrate having jurisdiction, or if the offence is non-cognizable, may send the accused in custody to such Magistrate and may bind over any person to appear and give evidence before such Magistrate. It is perfectly clear that, in taking action under that section, the Court may take evidence and record a finding before making a complaint. Section 476-A extends the power of making a complaint to a Court to which the civil, revenue or criminal Court, referred to in Section 476, is subordinate, where the subordinate Court has not made a complaint or refused to make one, but does not expressly mention the power to make a preliminary enquiry and record a finding before making a complaint, unless the last sentence, namely

and where the superior Court makes such complaint, the provisions of Section 476 shall apply accordingly

includes such a power. Section 476-B allows an appeal by an aggrieved person, where a civil, revenue or criminal Court has made, or refused to make, a complaint under Section 476 or Section 476-A, and the superior Court is empowered to direct the withdrawal of the complaint or itself to make the complaint which the subordinate Court might have made. Like Section 476-A, this section also ends with the sentence

and if it makes such complaint the provisions of Section 476 shall apply accordingly.

19. It is argued that a Court hearing an appeal under Section 476-B must decide, on the record before it, whether the complaint, made by the subordinate Court should be withdrawn or the appellate Court should make a complaint, as the case may be, and that it is not open to the appellate Court either to take additional

evidence or to remit the case to the subordinate Court for further evidence and fresh decision. It is pointed out that the sentence:

And if it makes such complaint, the provisions of Section 476 shall apply accordingly,

merely refers to the latter part of Section 476 empowering the Court to take sufficient security for the appearance of the accused before the Magistrate or to send the accused in custody to such Magistrate and bind over any person to appear and give evidence before such Magistrate. It is said that this is the only procedure which is relevant after a complaint is made. In other words, it is argued, the words 'If it makes such complaint' refer to stage after the complaint has been made, and not to any procedure necessary before it is made.

20. There is no doubt that the frame of these sections is faulty to a degree; but they should, in my opinion, be so read, if possible, as to avoid absurd results. I think the last sentence occurring in Sections 476-A and 476-B must mean one and the same thing, being identical as regards their phraseology; and to accept the contention already alluded to Section 476-A will lead to the highly undesirable result that, where a superior Court is moved to take an action under Section 476 in cases where no proceeding under that section was taken by the subordinate Court, the appellate Court is not empowered to make any preliminary enquiry or to record a finding that an offence has been committed, and yet it can make a complaint of the nature described in Section 476. I have no doubt that such a result was not contemplated by the Legislature. I would take the last sentence to mean that all the provisions of Section 476, including the provision for making a preliminary enquiry and recording a finding apply where the superior Court takes proceedings to see if a complaint should be made and that the phrase 'where the superior Court makes such complaint' means a case in which the superior Court eventually makes such complaint. In my opinion, the sentence which follows, namely, 'the provisions of Section 476 shall apply accordingly,' refers to the entire procedure laid down in Section 476, including the power to make a preliminary enquiry and to record a finding. It is a matter of common occurrence that a Court hearing a civil or criminal appeal arrives for the first time at the conclusion that

there is reason to believe that certain persons committed forgery or perjury and that a preliminary enquiry should be held to find whether any such offence was, in fact, committed and, if so, whether a complaint should be made under Section 476; and if the power of the Court which is to act under Section 476-A is so limited as is contended for, miscarriage of justice is likely to occur. If this view is correct as regards Section 476-A, the same must hold good as regards Section 476-B, in which the same sentence occurs. It follows that all the provisions, referred to in Section 476, are applicable to cases under Section 476-B, and the appellate Court can make a preliminary enquiry and record a finding that an offence, referred to in Section 476, has been committed and that a complaint should be made.

21. It is settled law for this Court that proceedings under Sections 476, 476-A and 476-B are to be regarded as civil or criminal according as they arise out of a civil or a criminal case, so that the revisional power of the High Court is subject to the provisions of Section 115, Civil P.C. or Section 439, Criminal P.C., as the case may be. In the matter of the petition of Bhup Kunwar (1904) 26 All. 249. A superior Court dealing with the case under Section 476-A or Section 476-B is acting in the exercise of its criminal jurisdiction. Section 540, Criminal P.C., confers on it a wide discretion in the matter of summoning and examining witnesses at any stage of any enquiry, trial or any proceeding under the Criminal P.C. Where such superior Court is acting as a civil Court hearing an appeal, Section 107, Civil P.C. similarly confers power to take additional evidence. Section 428, which occurs in Ch. 31, Criminal P.C. does not, in my opinion empower a superior Court, acting under Section 476-B, Criminal P.C. to take additional evidence. That section provides only for appeals under that chapter and to no other appeals. This view is in accord with *Dhanpat Rai v. Balak Ram* A.I.R. 1931 Lah. 761. As regards the power of the superior Court hearing an appeal under Section 476-B, Criminal P.C, to remand the case to the subordinate Court for further enquiry and reconsideration of its decision, it is clear to me that, where the subordinate Court has made a complaint under Section 476, it cannot, on reconsideration, withdraw the complaint already made. It is only the superior Court acting under Section 476-B, that can order the withdrawal of the complaint. It follows that Section 476-B does not contemplate a power of remand in the appellate Court for further enquiry and reconsideration of by the subordinate

Court, where the superior Court is moved to withdraw the complaint. In such a case the appellate Court may take additional evidence and may order the withdrawal of the complaint.

22. In the present case, the subordinate Court refused to make a complaint, and the superior Court remanded the case for further evidence being taken and a fresh decision arrived at by the subordinate Court. There is nothing in Section 476-B to justify such procedure. It is suggested that Section 423, Clauses (c) and (d), Criminal P.C., are wide enough to enable the appellate Court to reverse the order of the subordinate Court refusing to make a complaint and, as a result of such order, pass the consequential order remanding the case to the subordinate Court for fresh proceedings. This view is based on two assumptions, neither of which holds good. Firstly, it makes Section 423 applicable to proceedings under Section 476-B. In my opinion, it does not apply. The whole scheme of Ch. 31, in which it occurs, shows that it applies only to appeals (a) from conviction (Sections 407, 408, 410 and 411); (b) acquittal (Section 417) and (c) certain orders (Sections 405, 406 and 406-A). Section 423, Clauses (a), (b) and (c) define the powers of the appellate Court in the above three kinds of appeal. Unless it is specially applied, e. g., in Section 439, Criminal P.C., it does not apply to a special appeal like that under Section 476-B. Secondly, assuming Section 423, Clauses (c) and (d) are otherwise applicable, they are applicable only if an operative 'order' is passed. Under Section 476, Section 476-A or Section 476-B the Court passes no such order, but merely records a finding and makes a complaint like an ordinary individual. There is no other provision in the Criminal Procedure Code allowing a remand for fresh enquiry corresponding to a re-trial in a case of conviction. I answer the first question in the affirmative and the second in the negative.

Bennet, J.

23. I agree with the judgment of Hon'ble Niamatullah, J.