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January 25.

SANKATHA SINGH

v.

STATE OF U.P.

(S. K. DAS, K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

Criminal Procedure—Appellate Court's power to re-hear appeal after having dismissed it earlier—Code of Criminal Procedure, 1898 (Act V of 1898), ss. 367, 369, 424.

The question for decision was whether a criminal appellate court could order the re-hearing of an appeal which it had earlier dismissed, when neither the appellants nor their counsel appeared, holding that it had perused the record of the case and saw no reason for interference with the trial court's order.

Held, that the appellate court's omission to write a detailed judgment in a criminal appeal in which neither the appellant nor his counsel appeared might not be in compliance with the provisions of s.367 of the Code of Criminal Procedure and might be liable to be set aside by a superior court, but will not give that court itself power to set it aside and re-hear the appeal.

At the re-hearing of the appeal the successor of the appellate court was competent to consider, on an objection being raised by the other party, whether the appeal was validly up for hearing before him.

Section 369 read with s. 424 of the Code of Criminal Procedure specifically prohibits the altering or reviewing of its order by a court.

Inherent powers of the court cannot be exercised to do what the Code specifically prohibits the court from doing.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 145 of 1959.

Appeal by special leave from the judgment and order dated March 19,1959, of the Allahabad High Court in Criminal Revision No. 1299 of 1957.

S. P. Sinha and *P. C. Agarwala*, for the appellant.

G. C. Mathur and *C. P. Lal*, for the respondent.

1962. January 25. The Judgment of the Court was delivered by

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RAGHUBAR DAYAL, J.—Sankatha Singh and others appeal against the order of the Allahabad High Court dismissing their application for revision of the order of the Sessions Judge, Gyanpur, holding the order of his predecessor for the rehearing of an appeal which had been dismissed earlier to be *ultra vires* and without jurisdiction and directing the Magistrate to take immediate steps to execute the order passed by it, according to law.

The appellants were convicted by the Magistrate, I Class, Gyanpur, of offences under ss. 452 and 323 read with s.34, I.P.C. Kharpattu, one of the appellants, was also convicted of an offence under s. 324, I.P.C. They appealed against their conviction. The appeal was fixed for hearing on November 30, 1956. On that date, neither the appellants nor their counsel appeared in Court and the learned Sessions Judge dismissed the appeal. The relevant portion of his order is :

> "The appellants have been absent, and their learned counsel has also not appeared to argue the appeal on behalf of the appellants. I have perused the judgment of the learned Magistrate and seen the record. I find no ground for any interference. The appeal is accordingly dismissed."

On December 17, 1956, an application was presented by the appellants praying that the case be restored to its original number so that justice be done to them. In explaining their absence from Court on the date of hearing, it was said that they reached the Court somewhat late due to the Ekka, by which they were travelling, over-turning accidentally on the way and, as a result, their getting injuries. This application was allowed, on July 2, 1957, by the learned Sessions Judge, Sri Tej Pal Singh, who had dismissed the appeal. His reasons for allowing the application appear, from his order,

to be that the application, supported by an affidavit, showed that there was sufficient cause for the non-appearance of the appellants-accused at the time of the hearing of the appeal, that s. 423 of the Code of Criminal Procedure (hereinafter called the Code) enjoined the appellate Court to dispose of the appeal on merits after hearing the appellant or his pleader and the Public Prosecutor, that no notice was ever issued to the appellants as required by s. 422 of the Code, that s. 367 of the Code laid down what a judgment should contain and that his judgment of November 30, 1956, amounted to no judgment as it did not contain some of those salient points, that the judgment was without jurisdiction as the case was not really considered and no independent judgment was arrived at and that it was necessary that the appeal be re-heard in the ends of justice.

Sri Tripathi, who succeeded Sri Tej Pal Singh as Sessions Judge, and before whom the appeal was put up for re-hearing, was of the opinion that the appellate Court had no power to review or restore an appeal which had been disposed of and that therefore the order of his predecessor dated July 2, 1957, was *ultra vires* and passed without jurisdiction.

Against this order, the appellants went in revision to the High Court. The learned Judge of the High Court agreed with the views of Sri Tripathi and accordingly, dismissed the revision application.

The sole point for determination in this appeal is whether Sri Tej Pal Singh could set aside his first order dated November 30, 1956, dismissing the appeal, when neither the appellants nor their counsel appeared and could order the re-hearing of the appeal. We are of opinion that he could not do so and that therefore the view taken by the High Court is correct.

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A criminal appeal cannot be dismissed for the default of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal to enable them to appear, or should consider the appeal on merits and pass the final order. Sri Tej Pal Singh was aware of this as his order itself indicates. He did not dismiss the appeal for default. He himself perused the judgment of the Magistrate and the record and did consider the merits, as he says in his order : 'I find no ground for any interference'. The mere fact that he had not expressed his reasons for coming to that opinion does not mean that he had not considered the material on record before coming to the conclusion that there was no case for interference. His omission to write a detailed judgment in the circumstances may be not in compliance with the provisions of s. 367 of the Code and may be liable to be set aside by a superior Court, but will not give him any power to set it aside himself, and re-hear the appeal. Section 369, read with s. 424, of the Code, makes it clear that the appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error.

Sri Tej Pal Singh was in error when he thought that s. 423 of the Code enjoined the appellate Court to dispose of the appeal after hearing the appellant or his pleader and the Public Prosecutor. He omitted to notice the words 'if he appears' after the expression 'and hearing the appellant or his pleader'. If none of these appears at the hearing, the appellate Court can proceed with the disposal of the appeal on merits. Of course, a notice to the appellant or his counsel of the date of hearing is an essential precedent for the hearing of the appeal, in view of s. 422 of the Code. Sri Tej Pal Singh states, in his order dated July 2, 1957 :

> "It will also appear that the conditions of s.422, Cr. P. C. were also not fulfilled, as no notice was ever issued to the appellant."

He again missed noticing that a notice of the hearing of the appeal has to be given either to the appellant or to his pleader and need not be given to both. He does not say in his order that no notice of the date of hearing had been given to the appellants' counsel. The practice, usually, is to give notice of the date of hearing of the appeal to the counsel who informs the appellant, and not to the appellant personally. The application for restoration indicates that the appellant knew of the date of hearing.

It has been urged for the appellants that Sri Tej Pal Singh could order the re-hearing of the appeal in the exercise of the inherent powers which every Court possesses in order to further the ends of justice and that Sri Tripathi was not justified in any case to sit in judgment over the order of Sri Tej Pal Singh, an order passed within jurisdiction, even though it be erroneous. Assuming that Sri Tej Pal Singh, as Sessions Judge, could exercise inherent powers, we are of opinion that he could not pass the order of the re-hearing of the appeal in the exercise of such powers when s. 369, read with s. 424, of the Code, specifically prohibits the altering or reviewing of its order by a Court. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing. Sri Tripathi was competent to consider when the other party raised the objection whether the appeal was validly up for re-hearing before him. He considered the question and decided it rightly.

It is also urged for the appellants that Sri Tej Pal Singh, had the jurisdiction to pass orders on the application presented by the appellants on December 17, 1956, praying for the re-hearing of the appeal and that therefore his order could not

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be said to have been absolutely without jurisdiction. We do not agree. He certainly had jurisdiction to dispose of the application presented to him, but when s. 369, of the Code definitely prohibited the Court's reviewing or altering its judgment, he had no jurisdiction to consider the point raised and to set aside the order dismissing the appeal and order its re-hearing.

We therefore see no force in this appeal and accordingly dismiss it.

Appeal dismissed.

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January 29.

THE MANAGEMENT OF U.B. DUTT & CO.

v.

WORKMEN OF U.B. DUTT & CO.

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, JJ.)

Industrial Dispute—Termination of service of employee in terms of contract—Dropping of proposed departmental enquiry —If colourable exercise of power—If can be questioned before industrial—tribunal—Principle terminating Government Service —If applies to industrial employees.

S, employed by the appellant as a cross cutter in the saw mill was asked to show cause why his services should not be terminated on account of grave indiscipline and misconduct and he denied the allegations of fact. He was thereafter informed about a department enquiry to be held against him and was suspended pending enquiry. Purporting to act under r. 18(a) of the Standing Orders, the appellant terminated the services of S, without holding any departmental enquiry. The industrial tribunal to which the dispute was referred held, that action taken, after dropping the proposed departmental proceedings was not *bonafide* and was a colourable exercise of the power conferred under r. 18(a) of the Standing Order and since no attempt was made before it to defend such action by proving the alleged misconduct, it passed an order for reinstatement of S. The appellant contended that as the termination was strictly in accordance with the terms of contract under r. 18(a) of the Standing Orders, it was entitled to dispense