
(1907) 03 CAL CK 0024
In the Calcutta High Court
Case No : Rule No. 825 of 1907

Sheikh Amir Ali

APPELLANT

Vs

Mathoo Sahoo and Others

RESPONDENT

Date of Decision : 31-03-1907

Acts Referred:

Citation : (1907) 03 CAL CK 0024

Judgement

Mookerjee, J.—On the 16th December 1905, the present Petitioner applied to the District Judge of Gaya to be adjudged an insolvent. His application was refused on the 17th February 1906 and as he had been guilty of willfully making false statements respecting the property belonging to him and had committed other acts of bad faith regarding the matter of the application, he was sentenced under sec. 359 of the CPC to six months" imprisonment. Neither the order nor the warrant, however, specified the nature of the imprisonment. The Superintendent of the Gaya Jail consequently wrote to the District Judge on the 22nd February enquiring whether the sentence was simple or rigorous. On the 23rd February, without any notice to the Petitioner, the District Judge recorded an order in the order-sheet of the case that the imprisonment would be rigorous and the Superintendent was informed accordingly. On the 1st March 1906, the Petitioner preferred an appeal to this Court against the original order for imprisonment made on the 17th February, and subsequently obtained an order for stay of the sentence pending the hearing of the appeal. The appeal was dismissed on the 26th November 1906. On the 18th March 1907, at the instance of the Petitioner, the present rule was issued upon the creditors to show cause why the order of the 23rd February 1906, by which the character of the sentence was determined by the District Judge, should not be discharged as made without jurisdiction. Appearance has now been entered by the creditors and it has been argued by their learned vakil that the rule ought to be discharged on two grounds, namely, first, that as the order was appealable under cl. (29) of sec. 588 of the Code, it is not competent to this Court to interfere by way of revision under sec. 622; and, secondly, that the application has been made with unreasonable delay. In our

opinion, neither of the contentions is well-founded and the order of the Court below ought to be set aside. As regards the first contention advanced on behalf of the opposing creditors, we observe that cl. (29) of sec. 588 lays down that an appeal shall lie from orders under any of the provisions of the Code for the imprisonment of a person except when such imprisonment is in execution of a decree. The question, therefore, arises whether the order in question was made under any of the provisions of the Code. The learned vakil for the opposite party was invited by us to point out the particular provision of the Code under which the order of the 23rd February was made but he has failed to do so. No doubt the original order of imprisonment made on the 17th February was passed under sec. 359 of the Code. Imprisonment ordered under that section may be either simple or rigorous; this is clear from the General Clauses Act (X of 1897), sec. 4, sub-sec. (1) read with sec. 3, sub-sec. (26), as there is nothing repugnant in the subject or context of sec. 359 to this interpretation. The nature of the imprisonment, however, must be specified when the order is made; see *Government v. Radhoo Churn Ash* 18 W. R. Cr. 3 (1872). If the Judge omitted to state whether the imprisonment was to be simple or rigorous, it must be taken to have been simple imprisonment. After he had made an order under sec. 359, his power under that provision of the law was exhausted and he had no jurisdiction subsequently by an administrative order passed without notice to the Petitioner to determine that the imprisonment was to be rigorous. His order in substance amounted to an enhancement of sentence and is wholly unauthorized by any provision of the Code. It is quite competent, therefore, to this Court to interfere in the exercise of its revisional jurisdiction.

2. As regards the second ground taken on behalf of the creditors, no doubt there has been some delay in making the present application, but where the liberty of the subject is concerned, where the order in question is absolutely without jurisdiction and manifestly erroneous, and where the creditors have not been in the remotest degree affected or prejudiced by the delay, we are convinced that it would not be right to withhold relief on the ground of delay alone. The rule is, accordingly, made absolute. The order of the District Judge is discharged and it is declared that the nature of the imprisonment will be simple and not rigorous. The Petitioner is entitled to his costs in this Court. We assess the hearing fee at 3 gold mohurs.