Jodhey And Ors. vs State Through Ram Sahai on 16 January, 1952

Equivalent citations: AIR1952ALL788, AIR 1952 ALLAHABAD 788

ORDER

Nasir Ullah Beg, J.

1. This is an application on behalf of 20 accused under Article 227 of the Constitution of India read with Section 561A, Criminal P. C. The accused applicants were convicted by the Gaon Panchayati Adalat of Khajuria Awasi district Sitapur, under Section 160, Penal Code and sentenced to pay a fine of Rs. 40 each. The applicants filed a revision against their conviction before the Sub-Divisional Magistrate, Sitapur, who dismissed the revision on 17-4-1951. They filed another application for revision before the Sessions Judge of Sitapur who dismissed their revision on 16-6-1951, on the ground that no revision application against the order of the Panchayati Adalat was maintainable in the said Court under the U.P. Panchayat Raj Act (XXVI of 1947). The applicants have filed the present application in this Court under Article 227 of the Constitution of India and Section 561A, Criminal P. C. praying that the entire proceedings before the Panchayat including the order of conviction passed by the Panchayati Adalat be quashed as illegal and void in law.

2. Before the hearing of the application a preliminary objection to the maintainability of this application was taken by the learned counsel appearing on behalf of the complainant opposite party. The preliminary objection was based on Section 85, U. P. Panchayat Raj Act (XXVI of 1947). Under Sub-section (1) of Section 85 of the said Act, "if there has been a miscarriage of justice or if there is an apprehension of miscarriage of justice in any case, suit or proceedings, the Sub-Divisional Magistrate in respect of any case and the Munsif in respect of any suit and the Sub-Divisional Officer in respect of any proceeding under the Uttar Pradesh Land Revenue Act, 1901, may on the application of any party or on his own motion, at any time in a pending case, suit or proceeding as the case may be and within sixty days from the date of a decree or order, call for the record of the case, suit or proceeding as the case may be, from the Panchayati Adalat and may for reasons to be recorded in writing-- (a) cancel the jurisdiction of the Panchayati Adalat with regard to any suit, case or proceeding, or (b) quash any decree or order passed by the Panchayat Adalat at any stage."

Sub-section (5) of Section 85 provides that " except as aforesaid, a decree or order passed by a Panchayati Adalat in any suit, case or proceeding under this Act shall be final and shall not be open to appeal or revision in any Court. "

The learned counsel for the opposite party relies on the use of the word " final" and the words "shall not be open to appeal or revision in any Court" and argues that in view of the said provision contained in the Act the proceedings of the Panchayati

> Adalat and the order of the Sub-Divisional Magistrate cannot be questioned in this Court. With regard to Article 227 of the Constitution of India, the position taken up by him is that it applies only to administrative matters and not to judicial matters.

3. In order to interpret Article 227 of the Constitution a short historical retrospect of analogous provisions of law prior to the, Constitution of India would be instructive and helpful.

4. The Allahabad High Court was established by Letters Patent, dated 27-3-1866, issued under the Indian High Courts Act of 1861 being statute 24 and 25 vict. cap. 104. Under Section 15, High Courts Act, 1861, the High Courts established under that Act were given power of superintendence over all Courts which may be subject to their appellate jurisdiction. Under Section 9 of the same Act it was provided that each of the High Courts to be established under that Act "shall have and exercise all such civil, criminal admiralty ..... jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct .... and, save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts. "

> It is, therefore, clear that although the power of superintendence over all Courts was given to the High Court under Section 15, High Courts Act, Section 9 of the said Act expressly provided that power in criminal cases was to be exercised in accordance with the provision for the exercise of the same contained in the Letters Patent. It was, therefore, limited and circumscribed by any provision contained in regard thereto in the Letters Patent of the said High Court.

5. A reference to Clause 29, Letters Patent, of the Allahabad High Court shows that the proceedings in all criminal cases before the High Court in the exercise of its ordinary original criminal jurisdiction were regulated by the procedure and practice which was in use in the High Court of Judicature for Port William in Bengal, immediately before the date of the publication of the Letters Patent, subject to any law which has been or may be made in relation thereto by competent legislative authority for India ; and the proceedings in all other criminal cases were regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and by Act No. XXV [25] of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid. Thus, the Letters Patent of the Allahabad High Court provided that the power of the High Court in criminal matters could be limited by laws passed by competent legislative authorities. In view of the above provisions contained in Sections 9 and 15, Indian High Courts Act, 1861, and Clause 29, Letters Patent, Allahabad the view taken in the Allahabad Cases arising under the High Courts Act and the Letters Patent was that the power of superintendence possessed by the High Court did not enable the High Court to interfere with the Judicial orders of subordinate Courts acting within the sphere of their jurisdiction. Vide Tej Ram v. Harsukh, 1 ALL. 101 (F.B.), Maharaj Tewari v. Har Charan, 26 ALL.

144, and Jhingai Singh v. Ram Pratap, 31 ALL. 150.

6. The next step in the development of the law in this direction was taken under the Government of India Act, 1915. By Section 130 of the said Act the whole of the Indian High Courts Act 1861 (24 and 25 vict., c. 104) was repealed. The relevant provision was contained in Section 107, Government of India Act, 1915, which laid down that each of the High Courts shall have the power of superintendence over all Courts for the time being subject to its appellate jurisdiction. It is significant that the said power of superintendence was still confined to Courts which were subject to its appellate jurisdiction. It could, therefore, be argued that special Courts set up under particular Acts would fall outside the ambit of the power of superintendence of the High Court and were not, therefore, amenable to its jurisdiction with the result that the judicial orders passed by them could not be considered by the High Court.

7. The third step in the evolution of law in this regard was taken by the Government of India Act, 1935. The relevant provision relating to the power of superintendence of High Courts is contained in Section 224 of the said Act. The marginal note of Section 224 is "Administrative functions of High Courts." Under Section 224(a) the power of superintendence is given to every High Court over all the Courts in India for the time being subject to its appellate jurisdiction. Sub-clause (2) of Section 224, however, lays down that nothing in the said section would be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. The addition of Sub-clause (2) to Section 224 clearly indicates that the purpose of the section was to bar the jurisdiction of High Court to interfere with the judicial orders of lower Courts under the general power of superintendence given to the High Court by Sub-section (1) and to confine the said power to administrative matters. This seems to be the state of the law from the year 1935 up to the year 1950 when the present Constitution of India was passed.

8. The fourth and the last step in the development of law in this regard was taken by the Constitution of India which came into force on 26-1-1950. Article 227 which is the relevant provision for the present purposes, may be cited below: "227. (1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality o the foregoing provision, the High Court may

(a) call for returns from such Courts :

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such Courts and to attorneys, advocates and pleaders practising therein ;

Provided that any rules made, forms prescribed or tables settled under Clause (2) or Clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any Court or tribunals constituted by or under any law relating to the Armed Forces."

9. A comparison of the above provision of law with analogous provisions of law prior to the Constitution of India brings into prominence some important features of the new state of law established by the constitution. The most important feature of Article 227, Constitution of India, is that it has omitted any restriction on the power of the High Court to interfere in judicial matters, which was imposed by Sub-section (2) of Section 224, Government of India Act, 1935. In this way, it has enlarged the power of the High Court and restored the power, which was given to it under the Government of India Act, 1915. It is also significant that the words restricting the power of the superintendence of the High Courts for the time being subject to its appellate jurisdiction, a restriction which was contained not only in the Government of India Act 1935 but also in the Government of India Act, 1915, as well as in the High Court Act, 1.861, are also omitted from Article 227 of the Constitution of India. The effect of this omission to my mind is to make it clear beyond doubt that all Courts functioning within the territory in relation to which the High Court exercises its jurisdiction were subject to supervisory jurisdiction of High Court. Thus even special Courts set up under Acts of legislature for specific purposes would also be subject to its jurisdiction. It seems to me that in this regard Article 227 has vested the High Court with a greater power than that given to it even under the Government of India Act, 1915, or the High Courts Act, 1861.

It is also relevent in this connection to note that the Constitution of India has given this supervisory power to the High Court not only over all Courts but also over all tribunals throughout the territories in relation to which it exercises its jurisdiction. The word 'tribunals' did not find a place either in the Government of India Act of 1935 or in the Government of India Act 1915 or in the High Courts Act, 1861. The purpose of the addition of the word "tribunals" to Article 227, to my mind was to emphasise the fact that not only bodies which are Courts within the strict definition of that term would be subject to the supervisory jurisdiction of the High Court but all bodies that perform the functions of Courts and are akin to them are drawn within the purview of its supervision and cannot claim exemption from it merely by virtue of the fact that they do not come within the strict category of civil, revenue, or criminal Courts as known under the ordinary law of the land. Certain other minor changes in this Article are also noteworthy. A contrast of the marginal note appended to Article 227 of the Constitution of India with the marginal notes of Section 224, Government of the India Act, 1935, Section 107, Government of India Act 1915, and Section 15, High Courts Act, 1861, is instructive. The marginal note of Article 227 of the Constitution of India is "Power of superintendence over all Courts by the High Courts". This may be contrasted with the marginal note of Section 224, Government of India Act, 1935, which was "Administrative functions of the High Court" and the marginal note of Section 107, Government of India Act, 1915, which was "Powers of High Court with respect to subordinate Courts". Similarly, the marginal note of Section 15, High Courts Act, 1861, was "High Courts to superintend and to frame rules of practice for subordinate Courts", The alteration in this marginal note also emphasises the fact that the powers of the High

Court under the Constitution extend not merely to administrative functions but embraces all functions, whether administrative or judicial. It also indicates that this power under the Constitution extends to all Courts and is not confined to "subordinate Courts" as indicated by the marginal note of Section 107, Government of India Act, 1915. A comparison of the draft Constitution with the enacted Constitution shows that the marginal notes were inserted under the authority of and with the knowledge of the Constituent Assembly. Under the above circumstances the view regarding the in admissibility of marginal notes expressed by the Privy Council in Balraj Kunwar v. Jagatpal Singh, 31 Ind. App. 132 (P.C.) should be taken to have undergone change both in India as well as in England vide Iswari Prasad v. N. B. Sen, 55 Cal. W. N. 719 (F.B.). Marginal notes inserted in those circumstances have been held to be admissible by a Full Bench decision of the Allahabad-High Court in Ram Saran v. Bhagwat Prasad, A.I.R. 1929 ALL. 53 (F.B.) by a Full Bench decision of the late Chief Court of Avadh in Emperor v. Mumtaz Husain, A. I. E. 1935 Oudh 337 (F.B.) and by a Full Bench decision of the Bombay; High Court in Emperor v. Ismail Sayad Saheb Mujawar, A. I. E. 1933 Bom. 417 (P.B.). In a recent decision of the Bombay High Court reported in the State of Bombay v. Heman Santlal, A.I.R. 1952 Bom. 16, it was held by Chagla C.J. that the marginal notes of the Constitution may be referred to for the purpose of understanding the drift of the Articles. In Suresh Chandra v. Bank of Calcutta Ltd., 54 Cal. W.N 832 at p. 836 the marginal notes of an Indian Act were compared with the corresponding marginal notes of the English Act to elucidate the meaning of the section. The contrary view expressed in the Commr. of Income-tax Excess Profit Tax v. Parasram Jethanand, A.I.R, 1950 Mad. 631 and Sutlej Cotton Mills Ltd v Commr, of Income-Tax, West Bengal, A.I.R. 1950 Cal. 551 should not therefore, be accepted without qualification. The opinion which I, however, have formed is independently of the marginal notes and is based on the Article itself viewed in the light of its historical background.

10. To emphasise and to clarify the plenary nature of power of superintendence vested in the High Court the provision of law relating to it has been split up into four clauses. The first clause enunciates the general power of supervision given to High Court over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It is couched in a language which would vest the High Court with a power that is not fettered with any restriction and must embrace all aspects of the functions exercised by every Court and tribunal. On a proper interpretation of this clause it is difficult to my mind to hold that the powers of superintendence are confined only to administrative matters. There are no limits, fetters or restrictions placed on this power of superintendence in this Clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein. To fulfil this function it seems to me that the power of superintendence of the High Court over judicial matters is as necessary as over administrative matters. As a matter of fact judicial function of a Court is not less important than its administrative function. In fact it is more necessary to rectify lapses in judicial matters than defects in administrative matters. A judicial error might affect the rights, liberty and freedom of the subject whereas an administrative error might not do so. To my mind superintendence over judicial functions is a necessary complement of superintendence over administrative functions and it is sometimes very difficult to say where the one ends and the ether begins. If the High Court is to perform this function efficiently and effectively, it must act on both sides, otherwise the very power

of superintendence will be crippled and what has been achieved on the administrative side might be lost on the judicial side.

11. Clause 2 of Article 227 seems to emphasise the administrative aspect over which the High Court can exercise power of superintendence and enumerates the various instances of superintendence in the administrative field. The use of words "without prejudice to the generality of the foregoing provision" is not without significance. It seems to imply that the power of superintendence over administrative functions given to the High Court does not in any way derogate from the general power of superintendence given by Clause (1).

12. Clause (a) of Article 227 again enumerates certain specific matters which would fall on the administrative side of the work of a Court.

13. Clause (4) shows that the only Courts exempted from the superintendence of the High Court are Courts or tribunals constituted by or under any law relating to the Armed Force's. A mention of the solitary exemption also emphasises the clear field of superintendence which is left within the jurisdiction of the High Court after exempting the prohibited area covered by the Military Courts or tribunals mentioned therein.

14. A reading of the entire Article 227 of the Constitution of India in the light of the antecedent law on the subject leads one to the irresistible conclusion that the purpose of the constitution makers was to make the High Court responsible for the entire administration of justice and to vest in the High Court an unlimited reserve of judicial power which could be brought into play at any time that the High Court considered it necessary to draw upon the same. Springing as it does from the Constitution, which is the parent of all Acts and Statutes in India, the fact that the judgment or order of a Court or tribunal has been made final by an Act or the fact chat the body performing judicial functions is special tribunal constituted under a Statute cannot be set up as a bar to the exercise of this power by the High Court. The prohibited area is to be found within the four corners of the constitution itself and nowhere else.

15. The fact that these unlimited powers are vested in the High Court should, however, make the High Court more cautious in its exercise. The self-imposed limits of these powers are established and laid down by the High Courts themselves. It seems to me that these powers cannot be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by Courts or a gross abuse of jurisdiction possessed by them or an unjutifiable refusal to exercise a jurisdiction vested in them by law. Apart from matters relating to jurisdiction, the High Court may be moved to act under it when there has been a flagrant abuse of the elementary principles of justice or a manifest error of law patent on the face of the record or an outrageous miscarriage of justice which calls for remedy. Under this power, the High Court will not be justified in converting itself into a Court of appeal and subverting findings of fact by a minute scrutiny of evidence or interfering with the discretionary orders of Court. Further, this power should not be exercised, if there is some other remedy open to a party. Above all, it should be remembered that this is a power possessed by the Court and is to be exercised at its discretion and cannot be claimed as a matter of right by any party.

16. Within the short period elapsing after the birth of the Constitution there have been a large number of rulings which support the view taken by me. A reference in this connection might be made to the following cases : (1) Abdur Rahim v. Abdul Jabbar, 54 Cal. W.N. 445; (2) Narendra Nath v. Binode Behari, A.I.R. 1951 Cal. 138; (3) Girish Chandra v. Girish Chandra, A. I. R. 1951 Cal. 574; (41 Israil Khan v. State, A.I.R. 1951 Assam 106; (5) Mohammad Baquar v. State of Hyderabad, A.I.R. 1951 Hyd. 82; (6) Girdhar Lal v. State, 1952 ALL. W.R. (H.C.) 4 ; (7) Shridhar Atma Ram v. Collector of Nagpur, A.I.R. 1951 Nag. 90 and (8) A.R. Sarin v. B.C. Patil, A.I.R. 1951 Bom. 423.

17. In view of the above considerations, I overrule this preliminary objection and go on to deal with the case on merits.

18. The facts of the case are that on 24th September 1950, one Bam Sahai filed a complaint before the Panchayati Adalat, Khajuria Awasi, against 20 persons for an offence under Section 160, Penal Code. On 15th October 1950, a bench consisting of five panches was appointed to dispose of this case. The order of appointment purports to have been signed by one Suraj Bakhsh Singh and the names of the five panches who were appointed for the disposal of the case are :

> "1. Shri Nandkumar, 2. Shri Jagdish Prasad 3. Shri Puttu Lai, Ganeshpur, 4. Mullu Nawagaon, and 5. Haridwari Lal."
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> The statement of the complainant was taken on 29th October 1950, and the statement of the accused was also taken on the same date. There is nothing to show that the charge was explained to the accused. On 4th November 1950, an application was addressed to Shri Dutt, Sarpanch, Panchayati Adalat, Khajuria Awasi, praying that he should personally make enquiries into the case or appoint a commission for the purpose. It may be noted that this Shri Dutt Sarpanch was not a member of the bench to whom the case was sent for disposal and I have not been referred to any provision in the Panchayat Raj Act under which a Sarpanch has jurisdiction to interfere in a case pending before the Panches, who have been duly appointed to constitute a Bench for the purpose of disposal of the case. In spite of it the Sarpanch Shri Dutt proceeded to appoint, a commission consisting of Pandit Shri Dutt Vaidya and Pandit Jagdish Prasad. The order of the Sarpanch runs as follows :
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> "Enquiries be made in this case by Pandit Shri Duttji Vaidya and Pandit Jagdish Prasad personally. The Sarpanch is to personally fix a date for it."

Immediately after receiving a report by the commission an order was passed to the following effect:

> "The enquiries of the Sarpanch and Shri Dutt showed that the case of the complainant was true and the accused had assembled for the purpose of beating the complainant. The case under Section 160, Penal Code is accordingly proved and the accused are ordered to pay a fine of Rs. 40 each within a period of one month. On their failure to comply with the order within the said period, the said amount will be realised by execution and attachment against the property of the accused."

This purports to be the judgment of conviction, passed by the Panchayati Adalat. It is signed by only three out of the five panches appointed to try this case and one Sarpanch. The three panches who signed this order of conviction were Puttu Lal, Mullu and Hardwari Lal. The other to panches who were appointed to try the case, namely Shri Nandkumar and Shri Jagdish Prasad have cot signed the judgment at all. In addition to the signatures of the above three persons, the judgment is also signed by the Sarpanch Shri Dutt, who was not a member of the bench constituted to try this ease. Under the circumstances it is argued by the learned counsel appearing for the applicants that the judgment itself was void in law The above narration of facts discloses several irregularities commuted during the trial of the case.

19. The first grievance of the learned Counsel for the applicants is that a bench of five panches having been appointed to try the case, the interference by the Sarpanch in the case was unwarranted. Under Section 76(2), Panchayat Raj Act the Sarpanch or in his absence the Panch mentioned in Section 75 shall thereupon appoint a bench of the Panchayati Adalat under Section 49 and refer the said application to that bench for disposal and shall also fix a date for the first hearing of the application before the said bench and give notice of the said date to the applicant and to the members thereof. Under Section 77 of the Act every suit, case or proceeding instituted in accordance with the provisions of Section 76 shall be brought before the bench of the Panchayati Adalat on the date fixed and the bench shall, unless the Sarpanch is a member of it, choose one of their members to be the chairman of that bench who shall conduct the proceedings. This as well as the succeeding sections clearly indicate that once a bench of the Panchayati Adalat has been constituted, that bench alone has power to deal with the case and any unauthorised interference by the Sarpanch in the proceedings of the Adalat is not permissible unless the Sarpanch himself is a member of the bench. In the present case the Sarpanch Shri Dutt was not a member of the Bench. In spite of it he entertained the application for the appointment of commission. He actually appointed a commission. He fixed a date in the case and a perusal of the proceedings indicates that after that date he practically took charge of the disposal of the entire case. The final order indicates that he also conducted investigation along with the commission and that the report was framed under his guidance. Even the judgment was delivered under his signature. Under Rule 100 framed under the Panchayat Raj Act the Adalat shall record a brief judgment or order and the signatures of the panches shall be affixed to the record. In the present case the signatures of two of the panches who constituted the Adalat are wanting. It seems to me that the entire proceedings are ultra vires and not warranted by the provisions of the U. P. Panchayat Raj Act and any conviction based thereon must be held to be absolutely null and void and the proceedings relating thereto must be quashed as ultra vires and beyond jurisdiction.

20. Secondly, the learned Counsel for the applicants has argued that the charge was not explained to the accused. In this connection he invited my attention to Rule 95 framed under the Act. Under the said rule it is laid down that while trying a criminal case, it shall first explain to the "accused the charge or charges made against him." There is nothing to indicate that this mandatory provision of law was complied with and its omission must necessarily have prejudiced the accused and, in its absence, it is difficult to hold that the conviction of the accused is proper.

21. The third ground of complaint of the learned counsel for the applicants is that it was not open to the Adalat to appoint a commission. He has in this connection cited Section 83, Panchayat Raj Act which says :

> "It shall be the duty of the Panchayati Adalat to ascertain the facts of every suit, case or proceeding before it by every lawful means in its power and thereafter to make such decree or order with or without costs, as it may saem just and legal. It may make local investigation in the village to which the dispute relates."

On the basis of the aforesaid rule it is argued that it was open to the Adalat itself to make investigation in the case but it could not appoint a commission to carry on the investigation. Reliance in this connection is placed on Sant Prasad v. State, 1951 ALL. L.J. 719. It is, however, not necessary for me to decide this point, as I am of opinion that the very appointment of the commission was ultra vires, because the said commission was not appointed by any of the panches of the Adalat but was appointed by the Sarpanch, who being not a member of the bench was a third party and had no right to make orders in the said case. It is also noteworthy that after the appointment of the commission the bench appears to have abdicated its function. A perusal of the final judgment indicates that it merely adopted the recommendations of the Sarpanch and the commission without applying its own mind to it. It could, therefore, be rightly argued that the order is not an order of the bench at all but it is, as it purports to be the order of the commission adopted by the bench without applying its own mind to the facts of the case. This was certainly not the purpose contemplated by the Panchayat Raj Act and is not warranted by any of the said sections of the Act or the rules made thereunder.

22. Lastly it is argued by the learned counsel for the applicants that even if the facts mentioned in the complaint and given in the evidence are accepted in toto, no offence under Section 160, Penal Code has been made out. In this connection the contents of the application may be cited below:

> "Sir, The complainant most respectfully begs to state as under :
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> I was ploughing my field. It was 8 a. m. At that time Sita Ram came to raise khain in his field. He began to raise his khain by cutting my mend. I remonstrated with him and asked him not to do so, otherwise the khain would be pulled down. Then Sita Bam ran towards his house raising cries and saying, 'Village people, come up, Ram Sahai is killing me.' Instantly the rest of the accused came up to the scene of occurrence, armed with lathis. They had no concern with the said khain or mead. Had there been two or four more persons with me a faujdari (rioting) would have taken place and they would have killed somebody.
>
> Wherefore it is prayed that proper action be taken against the accused through the Adalat, and they be punished.
>
> Petition of Bam Sahai, son of Sheo Din, caste Lodh, resident of Mahmudpur.

Dated 24-9-1950.

Thumb impression of Ram Sahai."

23. The offence of affray for which the applicants have been convicted has been defined in Section 159 as follows :

> "Where two or more persons, by fighting in a public place disturb the public peace, they are said to 'commit an affray.' "

24. It clearly indicates that in order that an offence of affray might be constituted there must be a fight. A fight is a bilateral affair in which both parties should participate. Even if all the facts given in the complaint are accepted, they merely indicate that the 20 accused rushed to the rescue of Sita Ram. They did not attack the complainant, nor did the complainant do anything to bring the matters to the pitch of a fight. The evidence of the complainant does not add any further to the picture of the case. In Jagannath Sah v. Emperor, A.I.R. 1937 Oudh 425, it was held that mere quarrelling or abusing in a street without exchange of blows is not sufficient to attract the application of Section 159. In Rami Reddy v. Narasi Reddy, A.I.R. 1938 Mad. 924, it was laid down that when members of one party beat the members of another party and the latter do not retaliate or make any attempt to retaliate but remain passive, it cannot be said that there was fighting between the members of one party and the members of the other; and offence of affray cannot be said to have been established. To constitute an affray there must be a fight and it is not a fight when one side is aggressive and the other side is passive.

25. In view of the above position, it must be held that the offence under Section 160, Penal Code, was not made out against any of the accused.

Having gone through the entire facts and circumstances of the ease and having heard learned counsel for the parties at length, I have come to the conclusion that this application must be allowed. In view of the fact that I have held that no offence has been made out against the accused, even if the facts alleged in the complaint are accepted, I do not consider it necessary to order a retrial.

25. I accordingly allow this application, set aside the convictions of the accused and order that the fine, if paid, shall be refunded.