U. J. S. Chopra

Vs

State of Bombay

Criminal Appeal No. 20 of 1954

(CJI S. R. Dass, Syed Zafar Imam, N. H. Bhagwati JJ)

25.03.1955

JUDGMENT

DAS J. -

The appellant before us was on the 9th December, 1952 convicted by the Presidency Magistrate, 13th Court, Bombay, of an offence under section 66(b) of the Bombay Prohibition Act (Act XXV of 1949) and sentenced to undergo imprisonment till the rising of the Court and to pay a fine of Rs. 250 or to undergo rigorous imprisonment for one month. The appellant preferred an appeal to the High Court of Judicature at Bombay but his appeal was summarily dismissed by a Bench of that Court on the 19th January, 1953. After the dismissal of that appeal the State of Bombay made a Criminal Revision application to the High Court for enhancement of the sentence. Notice having been issued to the appellant under section 439(2) of the Code of Criminal Procedure, learned counsel for the appellant claimed the appellant's right under section 439(6) to show cause against his conviction. This the High Court did not permit him to do. The High Court, however, did not think fit to make any order for enhancement of sentence. On an application made on behalf of the appellant the High Court of Bombay has given leave to the appellant to appeal to this Court and granted a certificate of fitness under article 134(1)(c) of the Constitution of India.

The question for our consideration in this appeal is whether the summary dismissal of the appeal preferred by the appellant precluded him from taking advantage of the provisions of section 439(6) of the Code of Criminal Procedure when he was subsequently called upon to show cause why the sentence imposed upon him should not be enhanced. The question depends for its answer upon a true construction of section 439. That section, so far as it is material for our present purpose, reads as follows :-

> "439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 429.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

#(3).....(4).....
.....##

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

For a correct appreciation of the real meaning, import and scope of the provisions of sub-section (6) of section 439 it will be necessary to bear in mind its historical background. In England there is no provision for an appeal by the Crown either against an order of acquittal or for the enhancement of sentence. There the person convicted has a right of appeal both against his conviction and the sentence imposed upon him. Under the English criminal procedure, therefore, the question of enhancement of sentence only comes before the Court of Criminal Appeal when there is an appeal by the convicted accused. In this country the provisions relating to the Court's power of enhancement of sentence have undergone radical changes from time to time. Section 407 of the Code of Criminal Procedure, 1861 prohibited any appeal from acquittal. Express power was given to the appellate Court to reduce the sentence (section 425 and 426) and like power was given to the Sudder Court as a Court of revision (section 405 and 406). I find no provision in that Code authorising the Sudder Court to enhance the sentence. The Code of Criminal Procedure of 1872, however, by section 272 permitted the Government to file an appeal from acquittal. This was repeated in section 417 of the Code of 1882 which corresponds to section 417 of the present Code. Section 280 of the Code of 1872 expressly authorised all appellate Courts to enhance the sentence. This power of enhancement, however, was taken away from the appellate Courts by section 423 of the present Code of 1882 now reproduced in section 423 of the present Code and was vested in the High Court under section 439 of the Code of 1882 to be applied in exercise of its revisional power. This has been continued in our present section 439. This shows that the Legislature thought that this extraordinary power should be exercised only by the High Court and no other Court. A practice, however, appears to have grown up that in cases coming up before it for enhancement of sentence the High Court accepted the conviction as conclusive and proceeded to consider the question of enhancement of sentence on that basis. (See Emperor v. Chinto Bhairava ([1908] I.L.R. 32 Bom. 162). Then came Act XVIII of 1923 which, by section 119, amended section 439 by adding the present sub-section (6) and also amended section 369 by substituting the words "save as otherwise provided by this Code or by any other law for the time being in force, or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, "no Court" for the words "No Court other than a High Court" with which the section formerly opened. The results of these amendments were (i) to make the judgment or order of the High Court passed in exercise of its original criminal jurisdiction final which it was not under section 369 as it originally stood and to make this finality subject to the other provisions of the Code or of the Letters Patent of the High Court and (ii) to nullify the practice referred to above and to give a statutory right to an accused person who was threatened with the risk of having the sentence imposed on him by the trial Court or the lower appellate Court enhanced by the High Court in exercise of its revisional jurisdiction suo motu or at the instance of the State or in exceptional cases even of any other interested person. Sub-section (6), therefore, confers a new and a very valuable right on the subject which is designed to be a safeguard against the State or other interested person making frivolous revision application for

enhancement of sentence. The State or the person interested must, if they ask for an enhancement of sentence, be prepared to face the risk of the accused being altogether acquitted. It is the price or quid pro quo which the State or other interested person must be prepared to pay for the right or privilege of making an application for enhancement of sentence. The language used in sub-section (6) does not, in terms, place any fetter on the right conferred by it on the accused. This new right is not expressed to be conditioned of controlled by anything that may have happened prior to the revision application under sub-section (1) for enhancement of sentence. The section quite clearly says that Whenever there is an application for enhancement of sentence a notice must issue under sub-section (2) to the accused person to show cause and whenever such notice is issued the accused person must, under sub-section (6), be given an opportunity, in showing cause against enhancement, also to show-cause against his conviction. The sub-section does not say that he will have this right to show cause against his conviction only if he has not already done so. If the accused person appealed against his conviction and sentence to an appellate Court not being a High Court and lost that appeal after a full hearing in the presence of his opponent it must be conceded that he has had an opportunity to show cause against this conviction but nobody will contend that, that circumstance will prevent him from having another opportunity of showing cause against his conviction and sentence either by a substantive application initiated by himself under sub-section (1) or by way of defending himself when the State or other interested person applies to the High Court in revision under section 439(1) for enhancement of sentence and a notice is issued on him under section 439(2). (See Kala v. Emperor (A.I.R. 1929 Lah. 584)). Enhancement of sentence is undoubtedly an encroachment upon the liberty of the subject and a very serious matter for an accused person and the Legislature may quite properly have thought that whenever an accused person is sought to be laid open to the risk of having his sentence enhanced, the question of the legality and propriety of his conviction should be re-examined by the High Court in the context of this new jeopardy, irrespective of anything that might have happened prior to the application for enhancement of sentence and the issuing of the notice on the accused to show cause. Indeed, there is, in sub-section (6) itself, an indication in that behalf. This sub-section is to operate "notwithstanding anything contained in this section." In some of the decision (e.g. Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 785), Crown v. Dhanna Lal ([1929] I. L.R. 10 Lah. 241), Emperor v. Inderchand (A.I.R. 1934 Bom. 471) and King v. Nga Ba Saing (A.I.R. 1939 Rang. 392)) it has been said that the non-obstante clause refers only to sub-section (5). I find it difficult to accept this limited construction as correct. Sub-section (5) only says that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The idea is that if a person has a right of appeal he must first pursue that remedy. In other words, sub-section (5) is a disabling provision. By providing that no proceedings by way of revision shall be entertained at the instance of a person who, having a right of appeal, does not avail himself of it, the sub-section precludes such a person from initiating proceedings by way of revision. When the accused person under sub-section (6) shows cause against his conviction he himself initiates no proceedings but only exercises the right to show cause against his conviction which is given to him because somebody else has taken proceedings against him for enhancement and a notice has been issued on him under sub-section (2). In such a situation the accused person is on the defensive and the act of showing cause against proceedings initiated against him cannot properly be said to be proceedings "at his instance" which of High Court, by sub-section (5), is enjoined not to entertain. Strictly speaking sub-section (6) needs no exemption from sub-section (5). In any event and assuming that the act of showing cause against his conviction under sub-section (6) is tantamount to an application in revision initiated be him and such application is saved from the operation of sub-section (5) by the non-obstante clause of sub-section (6) I do not see any reason for holding that the non-obstante clause of sub-section (6) is concerned only with sub-section (5). Although in showing cause against

his conviction under sub-section (6) the accused person can urge all that he could do in an appeal, if not more, this act of showing cause is, nevertheless, in form at least, a continuation and indeed an integral part of the proceedings in revision initiated by the Court suo motu or by the State or any other interested party. The general rule is that the exercise of revisional power is entirely a matter of discretion which is to be exercised by the High Court not capriciously but on sound judicial principles. Indeed, sub-section (1) itself lays stress on this aspect of the matter by the use therein of the words "in its discretion." The non-obstante clause may well have been designed to emphasise that the new right conferred by sub-section (6) is a matter of right and does not rest entirely on mere discretion of the Court. Further the non-obstante clause has a special significance even in a case where the accused person has already had an opportunity, by means of an appeal or revision filed by him in the High Court, to show cause against his conviction. Under sub-section (1) there can be a revision only of the judgment or order of Criminal Courts inferior to the High Court and it does not sanction any revision of the judgment or order of the High Court itself. Therefore, where the accused person has unsuccessfully challenged the legality or propriety of his conviction in an appeal or revision application made by him before the High Court he cannot again initiate a substantive application before the High Court under section 439(1) of the Code to re-examine his conviction or sentence, for that will be to ask the Court to revise its own previous judgment or order, which the High Court cannot do under section 439(1). But suppose that the dismissal of the appeal or revision application made by the accused takes place in such circumstances that it still leaves it open to the State or other interested person to apply in revision for enhancement of the sentence and proceedings are initiated by the Court or the State for enhancement of sentence under section 439(1) and notice is issued on the accused under section 439(2), there is nothing in sub-section (6) which, in terms, prevents the accused, in that situation, to again show cause against his conviction and sentence. The only argument that may, in those circumstances, by advanced with some semblance of plausibility is that to let the accused person to again challenge his conviction or sentence under sub-section (6) is to cut across that provisions of sub-section (1) and in effect to permit the accused to ask the High Court to revise its previous order, although no substantive application could be initiated by him under sub-section (1). It may well be that the non-obstante clause in sub-section (6) was also designed to negative such an argument. Although ordinarily no substantive application can be initiated by an accused person, whose appeal or revision application has once been dismissed by the High Court, for revision or review of that order of dismissal, I can find no difficulty in construing and reading section 439(6) as giving to the accused person, who is faced with the risk of having his sentence enhanced, a second opportunity to do what he had previously failed to do. In other words, I see no incongruity in the Legislature giving a new right of revision to the accused person as a weapon of defence in the context of a new offensive taken by the State against him. Even if the act of showing cause under sub-section (6) is to be regarded as a revision, there was nothing to prevent the Legislature, in the interest of the liberty of the subject, to provide for a limited right of revision of the judgment or decision or order of the High Court itself. In my judgment that is what the Legislature has done by adding sub-section (6) to section 439 and the non-obstante clause in intended to meet and repel the objection that may possible have been taken on the score that, under sub-section (1), there can be no revision by the High Court of its own order. In my opinion, so long as proceedings may be taken against the accused person for enhancement of his sentence and so long as notice may be issued on him to show-cause against enhancement, so long must he have, in showing cause against enhancement of sentence, the right, under sub-section (6), to show cause against his conviction, irrespective of anything that may have happened previously. That is how I read the Sub-section. Indeed, in Emperor v. Mangal Naran ([1924] I.L.R. 49 Bom. 450) McLeod, C.J., went further and expressed the view that if, after an appeal had been heard on its merits and dismissed, a notice to enhance sentence was issued, the accused would still have the right

to show cause against his conviction although any attempt to set aside his conviction would not have much chance of success. For reasons to be stated hereafter I would rather say that in such a situation no application for enhancement would lie at all and that consequently no question would arise of the accused person exercising his right under sub-section (6). This aspect of the matter that I am trying to indicate an emphasise does not appear to have been sufficiently adverted to in the subsequent decisions of the different High Courts in Indian except in one decision of a Full Bench of the Lahore High Court. It will be convenient at this stage to refer to those decisions.

In Emperor v. Jorabhai (supra) the accused person was convicted by the Sessions Judge. He preferred an appeal to the High Court and a Bench of the High Court dismissed the appeal on merits after full hearing of both sides after notice or appeal had been served on the State. After the delivery of the judgment an oral application was made to the Bench by the Government pleader for the enhancement of the sentence. Notice was issued to the accused under section 439(2) of the Code. The accused claimed the right, under sub-section (6) to challenge his conviction. It was held by Fawcett and Madgavkar, JJ., that section 439(6) did not justify what would be tantamount to a rehearing of the appeal on merits.

In the case of Ramlakhan Chaudhury v. Emperor ([1931] I.L.R. 10 Pat. 872) the accused's appeal had been previously dismissed after a full hearing and following the decision in Emperor v. Jorabhai (supra) it was held that the accused could not, under section 439(6), challenge the correctness of his conviction for the second time while showing cause against enhancement of sentence. The same principle had been extended to cases where the appeal of the accused person had been previously dismissed by the High Court summarily but after hearing the accused or his advocate. (See Emperor v. Batubai (A.I.R. 1927 Bom. 666), Emperor v. Haji Khamoo (A.I.R. 1936 Sind 233), King v. Nga Ba Saing (supra), Emperor v. Naubat (I.L.R. [1945] All. 527)), to cases where the jail appeal of the accused had previously been dismissed summarily without hearing the accused or his advocate (see Emperor v. Koya Partab ([1930] I.L.R. 54 Bom. 822), Emperor v. Abdul Qayum (A.I.R. 1933 All. 485), Ramchand v. Hiralal (A.I.R. 1942 All. 339) and State v. Bhavani Shankar (I.L.R. [1952] 2 Raj. 716) and to cases of dismissal or revision petition filed by the accused after hearing the advocate (see In re Saiyed, Anif Sahib (A.I.R. 1925 Mad. 993), Emperor v. Sher Singh ([1927] I.L.R. 8 Lah. 521), Crown v. Dhanna Lal (supra) and also to the case of an accused whose revision petition has been summarily dismissed (see Emperor v. Inderchand (supra)). It has been held that for the purposes of section 439(6) it makes no difference whether the Judgment or order of dismissal was made by the High Court in appeal or in revision, or whether the appeal or revision was dismissed summarily or after a full hearing on notice to the State or other interested party and that any dismissal of the appeal or revision prevents the accused person from availing himself of the benefit of section 439 (6). In two cases Emperor v. Lukman (A.I.R. 1927 Sind 39) and Emperor v. Shidoo (A.I.R. 1920 Sind 26) the Sind Court took up an intermediate position that the accused person whose appeal had been dismissed summarily or after full hearing could not challenge his conviction for the second time except to the extent that the conviction was not founded on legal evidence or was manifestly erroneous. In other words, he could only go up to what was ordinarily permitted in a revision. These two decisions appear to me, with respect, to be illogical and I need say no more about them. In the other cases noted above it had been quite definitely held that the accused person whose appeal or revision application has been previously dismissed, summarily or after a full hearing, is not entitled, when called upon to show cause why the sentence should not be enhanced, to question the correctness of his conviction for the second time. In other words, the previous dismissal, according to of these decisions, is an adjudication by the High Court of the correctness of his conviction and on the principle of finality of judgment embodied in sections 369 and 430 of the Code of Criminal Procedure that adjudication cannot be called in question under

section 439(6). It has been pointed out in several cases (Crown v. Dhanna Lal (supra), Emperor v. Inderchand (supra) and King v. Nga Ba Saing (supra)) that sub-section (6) opens with the words "notwithstanding anything contained in this section" and not with the words "notwithstanding anything contained in this Code" and from this the inference has been drawn that while the sub-section is to operate notwithstanding the provisions of sub-section (5) it cannot override the other provisions of the code, and, therefore, the operation of sub-section (6) is conditioned or controlled by the principle of finality of judgment embodied in section 369 and section 430. Some learned Judges have expressed the view (see In re Saiyed Anif Sahib (supra), Crown v. Dhanna Lal (supra)) that the words "unless he has already done so" are to be read in section 439(6), for this is to be implied from the presumption of finality. In some cases (see Emperor v. Sher Singh (supra) and Ram Lakhan v. Emperor (supra)) the decision has been placed also on the ground of the inherent incapacity of one Judge of the High Court to reconsider the decision of another Judge of that Court. It is necessary to examine these grounds a little closely to ascertain their validity.

In order to appreciate the true meaning and exact scope of section 369 and 430 on which the argument of finality of judgment is founded it is necessary to keep in view the general scheme of the Code. Part VI of the Code deals with "Proceedings in Prosecutions." Chapter XV lays down the jurisdiction of the Criminal Courts in Inquiries and Trials. I pass over Chapters XVI TO framing XVIII. Chapter XIX prescribes rules for the framing and joinder of charges. Chapters XX to XXIII deal with different kinds of trials, e.g., trial of summons cases, warrant cases, summary trials and trials before High Courts and Courts of Session. Chapter XXIV contains general provisions as to Inquiries and Trials. Mode of taking and recording evidence is prescribed by the sections grouped together in Chapter XXV. Then comes Chapter XXVI which is headed "Of the Judgment." Section 369 is one of the sections included in this chapter. Chapter XXVII provides for the submission of death sentences for the confirmation of the High Court. Rules relating to the execution, suspension, remission and commutations of the sentences are to be found in Chapters XXVIII and XXIX. Part VI ends with Chapters XXX which is not material for our present purpose. Part VII deals with "Appeal, Reference and Revision." Chapter XXXI is concerned with Appeals and we find section 430 in this chapter. Chapter XXXII provides for reference and revision, section 439 being one of the sections included in this chapter. In view of the scheme summarised above there can be manner of doubt that the provisions of the sections collected in Chapter XXVI are concerned with judgments pronounced by the trial Court. This conclusion is certainly reinforced by the language of some of these sections. Thus section 366 which is the very first section in this chapter refers to "The Judgment in every trial in any Criminal Court of original jurisdiction." Section 367 provides what must be contained in "every such judgment," that is to say judgment in an original trial. Section 369 runs as follows :

> "369. Court not to after Judgment. - Save as otherwise provided by this Code or by any other law for the time being in force or, "in the case of a High Court by the Letters Patent or other instrument constituting such High Court," no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

The opening words "save as otherwise provided by this Code..... constituting such High Court" were added by section 119 of the Amending Act XVIII of 1923 and were further adapted by Adaptation of Laws Order, 1950. There can be no question that the finality embodied in this section is only in relation to the Court which pronounces the judgment, for it forbids the Court, after it has singed its judgment, to alter or review the same. In other words, after pronouncing the judgment the Court that pronounces it becomes functus officio. There is indication in the Code itself that the

purpose of section 369 is not to prescribe a general rule to finality of all judgments of all Criminal Courts but is only to prescribe finality for the judgment of the trial Court so far as the trial Court is concerned. That this section does not, by itself, apply to the judgment of an appellate Court is quite obvious, because if it did, there would have been no necessity for enacting section 424 specifically making the rules contained in chapter XXVI, which includes section 369, applicable to the judgment of any appellate Court other than High Court, nor for again prescribing by section 430 a rule of finality for judgments and orders passed by an appellate Court. It, therefore, follows that while, subject to the other provisions of the Code or any other law and of the Letters Patent, the finality of section 369 attaches to the judgments pronounced by all trial Courts including the High Court in the exercise of its original criminal jurisdiction it certainly has no bearing on the question of finality of appellate judgments which is specifically provided by section 430 of the Code. Again, the rule of finality embodied in section 369 cannot, in terms, apply to the orders made by the High Court in exercise of its revisional jurisdiction, for section 442 of the Code which requires the result of the revision proceedings to be certified to the Court by which the finding, sentence or order revised was recorded or passed refers to it as its "decision or order" and not "judgment." It is significant that section 425 which requires the result of appeal to be certified to the lower Court refers to it as its "judgment or order." All these considerations herein alluded to quite clearly establish that section 369 cannot in any manner control section 439(6). In any case, section 369 is "subject to the other provisions of the Code" and I see no reason why section 439(6) should not be regarded as one of such other provisions. It cannot be overlooked that the words "subject to the other provisions of the Code, etc." were introduced into section 369 at the same time as sub-section (6) was added to section 439. As I read the new sub-section, it is a substantive statutory right conferred on the subject and full effect should be given to it unless there is any insuperable difficulty in the way of doing so. If section 369 were susceptible of as wide a meaning as is read into it, namely, that it applies to all judgments of all Courts, original, appellate or revisional, I would, in that case, hold that that meaning must be taken as cut down, by reason of the words "subject to the other provisions of the Code, etc." In other words, section 439(6) must be read as controlling section 369 rather than the other way about. Finally, section 369 being subject to the other provisions of the Code must be read as subject to section 430 and as the finality enshrined in the latter section does not attach to decisions or orders made in revisions by reason of chapter XXXII being expressly excepted from its operation, the rule of finality embodied in section 369, even if it be as wide as it is contended to be, cannot affect cases provided for in Chapter XXXII.

I now pass on to section 430 which is also relied on as furnishing a principle of finality which is supposed to control the operation of section 439(6). Section 430, in terms, applies to "judgments and orders" passed by an appellate Court. It has no application to "decisions or orders" made by the High Court in revision. It has been contended that the exception made in section 430 in respect of cases provided for in Chapter XXXII only exempts the judgments or orders of an appellate Court other than a High Court from the rule of finality embodied in section 430, because they are made revisable by the High Court under section 439(1). Section 439(1) does not contemplate or permit judgments or orders made by the High Court in exercise of its original of appellate criminal jurisdiction to be revised by the High Court. As, therefore, the appellate judgments or orders of the High Court cannot, under section 439(1), be made the subject-matter of any revision application, such appellate judgments or order did not fall within the exception made in section 430 and were accordingly left subject to the rule of finality embodied therein. Two answers occur to me. If the effect of the new sub-section (6), as I have already explained, is to confer a new right on an accused person notwithstanding anything contained in section 439(1), that is to say, if sub-section (6) is read, as I think it should be, as a statutory provision expressly making the judgment or decision or order

of the High Court passed in exercise of its appellate or revisional jurisdiction subject, for the purpose of the protection of an accused person whose appeal or revision had been previously dismissed, to re-examination by the High Court only as and when he is subsequently faced with an application for enhancement of sentence, then such judgment, decision or order of the High Court does, as a result do section 439(6), become the subject-matter of a case provided for in Chapter XXXII of the Code. In other words, the scope of Chapter XXXII having been enlarged by the addition of sub-section (6) to section 439, the scope of the exception to section 430 must also stand enlarged so as to include within the exception whatever, after the amendment of section 439, may come within Chapter XXXII and, therefore, cases now coming within that Chapter must stand free from the rule of finality embodied in section 430. The other answer is to be found in two of the decisions of the Allahabad High Court, namely, Emperor v. Abdul Qayum (supra) and Ram Chand v. Hiralal (A.I.R. 1942 All. 339) where it has been held that section 430 by its own terms saves the revisional power of the High Court to enhance the sentence. In each of these cases the jail appeal filed by the accused had been dismissed by the High Court summarily. If the rule of finality of appellate judgments does not attach to the summary dismissal of the jail appeal by the High Court so as to prevent the State from invoking its revisional power to enhance the sentence, surely the accused's right to show cause against his conviction under section 439(6), which is consequential and arises only upon a rule for enhancement being issued under section 439 (2) and is, therefore, a part of the revisional proceedings for enhancement of sentence, must, on a parity of reasoning be also free from the same principle of finality. It, therefore, follows that section 439(6) is not, in terms, controlled by section 369 section 430. Whether the sub-section is controlled by the general principle of finality of judgments and if so to what extent are different questions which will be discussed later.

The second ground on which some of the decisions rest, namely, the inherent incapacity of one Judge of the High Court to reconsider the decision of another Judge if the High Court may easily be disposed of. The theory of inherent incapacity must give way to the statutory capacity conferred by section 439(6). If on a true construction a statute states, expressly of by necessary intendment, that one Judge or one Bench shall have jurisdiction and power to decide something, the theory of inherent incapacity of such Judge or Bench cannot be invoked to prevent the exercise of such jurisdiction and power merely on the ground that the decision which may be arrived at in exercise of this new jurisdiction or power may run counter to the previous decision arrived at by another Judge or Bench in exercise of another jurisdiction or power. I see no reason why section 439(6) may not be read as a provision which, by necessary implication, enables the High Court to re-examine its own previous order on the happening of certain contingencies, namely, upon the accused person, whose appeal or revision has been dismissed, being faced with the risk of having his sentence enhanced and a notice being issued to him for enhancement.

To reinforce the argument that section 439(6) is controlled by sections 369 and 430 reference has been made to section 423(2) and it has been contended, on the authority of various decisions, that the right given by section 439(6) is not absolute but is controlled by the provisions of section 423(2) which lay down some limitations in the matter of appeal from convictions in a jury trail. Even on that topic some learned Judges have taken divergent views. It is not necessary, on this occasion, to express any opinion on that question and I reserve my right to examine the position as and when an occasion may arise in future. Even if section 439(6) is controlled by section 423(2), that circumstances certainly does not indicate when and under what circumstances the right under section 439(6) may be availed of. In any case, that consideration has no bearing on the argument of finality of judgments sought to be founded on sections 369 and 430.

It will be convenient at this stage to refer to the decision of a Full Bench of the Lahore High Court in Emperor v. Atta Mohammad ([1943] I.L.R. 25 Lah. 391) and to deal with the argument founded on and developed from some of the reasoning's adopted by the learned Judges constituting that Full Bench. In that case the revisions application of the accused had been dismissed in limine by the High Court. Subsequently the Crown applied for enhancement of sentence. Notice having been issued under sub-section (2) of section 439 the accused person claimed the right, under sub-section (6), to show cause against his conviction in spite of the fact that his revision application had been dismissed. The Advocate for the Crown relied on the cases referred to above and contended that the order of dismissal of the revision application by the High Court was final as regards the correctness of the conviction, that that order could not again be revised by the High Court, that the accused was no longer entitled to challenge his conviction and that it made no difference that his revision petition had been dismissed in limine. The Full Bench overruled the earlier decision of the Court in Crown v. Dhanna Lal (supra) and held that the accused was, in the circumstances of the case, entitled to show cause against his conviction, notwithstanding the fact that his application for revision had been dismissed in limine. The reasoning adopted by Blacker, J., was shortly as follows : That an order dismissing a revision petition in limine is an order made under section 435 and not under section 439 that such an order is not a judgment and, therefore, the principle of finality embodied in section 369 does not apply to such an order, because such a dismissal only meant that the Judge saw no adequate grounds disclosed in the petition or on the face of the judgment for proceeding any further; that, in the picturesque language of the learned Judge, in such a dismissal "there is no finding or decision unless it can be called a decision to decide to come to no decision;" that the jurisdiction exercised by the Court under section 439(6) was appellant jurisdiction and that an order of acquittal thereunder did not amount to a review of an order of dismissal under section 435; and finally that if the order under section 435 was a judgment or if an order of acquittal under section 439(6) was a review of such judgment, such review was not barred by section 369, because of the saving provisions with which the section begins. Mahajan, J., as he then was, put in the forefront of his judgment the view that section 439(6) which was introduced by amendment in 1923 gave a new and unlimited right to the subject; that the Judge hearing the application for enhancement was bound to go into the facts to satisfy himself as to the correctness of the conviction; that the exercise of revisional jurisdiction was a mere matter of favour and a dismissal in limine of such application amounted only to a refusal to look into the record and was in no sense a judgment. Ram Lall, J., did not deliver any separate judgment but concurred generally with the other learned Judges.

It will be noticed that this decision of the Lahore High Court rests mainly on two grounds, namely, (1) that in a dismissal of a revision application in limine there is no finding or decision at all and that it is nothing more than a refusal to send for the records or to look into the matter and is, therefore, not a Judgment, and (2) that, in any case, section 439(6) gives a new statutory right to the accused person to challenge the legality or propriety of his conviction, although his previous application for revision of the order of the lower Court had been dismissed in limine and that such a review of that dismissal order in not barred by section 369 because of the saving provision at the beginning of that section. The Full Bench expressly declined to express any opinion as to the effect of dismissal of an appeal on the right given by sub-section (6). The principle of the first ground of the Lahore Full Bench decision has, however, been extended by the Rajasthan High Court in The State v. Bhawani Shankar (supra) to a case where there respondent's jail appeal had been summarily dismissed. According to Wanchoo, C.J., the accused, whose jail appeal had been dismissed summarily, was in the same position as the accused, whose revision petition had been dismissed in limine, for he too could not be said to have had an opportunity of showing cause against his conviction. The learned Chief Justice, however, did not desire to go further and expressed the view

that if an appeal were dismissed summarily but after hearing the party or his pleader the accused could not claim to have a second opportunity to challenge his conviction under section 439(6), because in that case he had been heard and, therefore, had an opportunity to show cause against his conviction when his appeal had been summarily dismissed.

It will be recalled that in Emperor v. Jorabhai (supra) and the other cases which followed it was said that for the purposes of determining the applicability of section 439(6) it made no difference in principle whether the proceedings filed by the accused which had been dismissed was an appeal or a revision or whether the dismissal was summary or after a full hearing and that in none of such cases could the accused person claim a second opportunity to question the legality or propriety of his conviction when he was subsequently called upon to show cause why the sentence passed in him should not be enhanced. In the Lahore Full Bench case and the Rajasthan case referred to above a distinction has, however, been made between a summary dismissal and a dismissal after a full hearing of the appeal or revision filed by the accused. In my judgment there is a substantial distinction between these two kinds of dismissals as regards their effect on the rights of accused persons as I shall presently indicate.

I am, however, unable to accept the argument adopted by the Lahore Full Bench that a summary dismissal of a revision application filed by the accused must be regarded as an order made under section 435 and not one under section 439, that such summary dismissal is nothing more than a refusal on the part of the High Court to go further or to look into the application and that in such a dismissal there is no finding or decision at all. Far less am I able to accede to the proposition that a summary dismissal of a jail appeal also stands on the same footing. Sections 421, 435 and 439 undoubtedly vest a very wide discretion in the Court. Discretion, as Lord Halsbury, L. C., said, in Sharp v. Wakefield (L.R. [1891] A.C. 173 at p. 179), means sound discretion guided by law. It must be governed by rules of reason and justice and not according to private opinion; according to law and not by humour or caprice. It must not be arbitrary, vague and fanciful but must be legal and regular. This discretion is given to the High Court for the purpose of dealing with and disposing of the proceeding brought it and not for not deciding it. The primary and paramount duty of the Court is to decide the appeal or revision and it is to exercise its discretion in so deciding it. In deciding the appeal or revision the High Court may choose which of its powers it will exercise if the circumstances of the case call for such exercise. In a clear case, apparent on the grounds of appeal or revision or on the face of the judgment appealed from or sought to be revised it may come to the conclusion that the case has no merit and does not call for the exercise of any of its powers in which case it may dismiss it summarily. If, however, it has any doubt, it may call for the record or may admit it and issue notice to the respondent and decide it after a full hearing into presence of all parties. But decide it must at one stage or the other. The discretion conferred on the High Court does not authorise it to say that it will not look at the appeal or the revision. The court's bounden duty is to look into the appeal or revision and decide it, although in the process of arriving at its decision it has very wide discretion. When the Court summarily dismisses an appeal whether without hearing the accused or his pleader as in the case of a jail appeal or after hearing the accused or his pleader but before issuing any notice to the respondent as in an appeal presented by the accused or his pleader, the Court does decide the appeal. It is indeed a very serious thing to say that sections 421, 435 or 439 give the Court discretion not to decide the appeal or revision brought before it and I, for one, am not prepared to countenance and much less encourage such an idea. In my judgment a summary dismissal of an appeal or revision does involve an adjudication by the High Court just as a dismissal after a full hearing does. The only difference, as we shall presently see, is as to the respective nature, scope and effect of the two adjudications.

It has been said that when an appeal or revision is dismissed after a full hearing by the High Court the judgment of the lower Court merges in the High Court judgment and the High Court judgment replaces the judgment of the lower Court and becomes the only operative judgment but that when the appeal or revision is summarily dismissed by the High Court there is, in such a dismissal, no finding or decision which can replace the judgment of the lower Court. It is, therefore, said that there can be no showing cause against his conviction under sub-section (6) in the first case, for it will involve a revision of the High Court's decision but the position will be otherwise in the second case where the dismissal was summary. This argument to me to be untenable and fallacious. Section 425 of the Code requires that whenever a case is decided on appeal by the High Court under Chapter XXXI it must certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed and that Court shall thereupon make such orders as are conformable to the judgment or order of the High Court and that, if necessary, the record shall be amended in accordance therewith. Likewise, section 442 requires that when a case is revised under Chapter XXXII by the High Court, it shall, in the manner provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and that that court shall thereupon make such orders as are conformable to the decision so certified and that, if necessary, the record shall be amended in accordance therewith. This certificate is sent in every case, whether the appeal or revision is disposed of summarily or after a full hearing. Where an appeal or revision is disposed of after a full hearing on notice to the respondent and allowed wholly or in part becomes ex facie obvious that the judgment appealed against or sought to be revised has been altered by the judgment or decision of the High Court on appeal or revision and a note is made in the record of this alteration. But when an appeal or revision is dismissed after full hearing and the sentence is maintained there is outwardly no charge in the record when the certificate is sent by the High Court but nevertheless there is an adjudication by the High Court. In the first case it is judgment of acquittal or reduction of sentence and in the second case it is a judgment of conviction. Likewise, when an appeal or revision is summarily dismissed, such dismissal maintains the judgment or order of the lower Court and a note is made of such dismissal in the record and in the eye of the law it is the judgment of the High Court that prevails. To the uninstructed mind the change may be more easily noticeable in the first case than in the other two cases but on principle there is no difference. I can see no reason for holding that there is a merger or replacement of judgment only in the first two cases and not in the last one. In my opinion, it makes no difference whether the dismissal is summary or otherwise, and there is a judgment of the High Court in all the three cases.

It is at once urged that if the summary dismissal of an appeal or revision is also a judgment then the rule of finality prescribed by sections 369 and 430 will at once apply to it and a cunning accused may by putting up an obviously untenable appeal or revision and procuring an order of summary dismissal of it, prevent the State or any other interested party from making an application for enhancement of the sentence. The apprehension, to my mind, is unfounded for reasons more than one. When an appeal or revision is filed by an accused person he sets out his grounds in detail, challenging both his conviction and sentence. From the very nature of things he does not raise any question of enchancement of the sentence. At that stage no notice or rule having been issued the respondent is not before the Court to raise the issue of enhancement. So the summary dismissal only confirms the conviction and decides that the Court sees no ground for reducing the sentence. It is in no sense a decision that the sentence should not be enhanced for that issue was not before the Court at all and so it has been said, I think rightly, in several cases, [e.g., In re Syed Anif Sahib (supra)], Emperor v. Jorabhai (supra) and Emperor v. Inderchand (supra)]. The fact the High Court simply dismisses the appeal or revision summarily without issuing the notice on the accused under section

439(2) for showing cause against enhancement is a clear indication that the High Court has not considered the question of enhancement. It is true that the rule of finality prescribed by section 430 applies to the appellate judgment of the High Court, subject to the exception regarding cases falling within Chapter XXXII. It is also true that although the revisional power is not expressly or in terms controlled either by section 369 or section 430, the general principle of finality of judgments attaches to the decision or order of the High Court passed in exercise of its revisional powers. But this finality, statutory or general, extends only to what is actually decided by the High Court and no further. When an appeal or revision by the accused is allowed after a full hearing on notice to the respondent the conviction and sentence must be regarded as having been put in issue and finally decided. When the accused person in the presence of the State claims an acquittal or reduction of his sentence, the State ought then and there to apply for enhancement of sentence and its failure to do so cannot but be regarded as abandonment of the claim. The acceptance by the High Court of the appeal or revision on notice to the respondent and after a full hearing is, therefore, nothing less than a judgment of acquittal or a judgment for reduction of sentence. On the other hand, the dismissal by the High Court of an appeal or revision after such a full hearing amounts to a judgment of conviction. In both cases the judgment is final as regards both the accused and the respondents as regards the conviction as well as the sentence in all its aspects, namely, reduction or enhancement. In that situation no further question of revision can arise at the instance of either party. There can be no further application by the accused challenging his conviction or sentence. Nor can there be any further application by the State for enhancement of the sentence, for that question could have been and should have been raised when the accused person in the presence of the respondent prayed for acquittal or reduction of sentence and not having then been raised it cannot be raised subsequently and consequently no question can arise for the exercise of right by the accused under section 439(6). This result is brought about not by any technical doctrine of constructive res judicata which has no application to criminal cases but on the general principle of finality of judgments.

The summary dismissal of an appeal or revision by the accused, with or without hearing him or his pleader but without issuing notice to the respondent is, so far as the accused is concerned, a judgment of conviction and confirmation of his sentence and he can no longer initiate revision petition against his conviction or sentence. The judgment or decision is a final judgment qua the accused person, for otherwise he could go on making successive appeals or revision applications which obviously he cannot be permitted to do. But the State or other interested person who has not been served with any notice of the appeal or revision cannot be precluded, by the summary dismissal of the accused's appeal or revision, from asking for enhancement, for in that situation the State or the complainant not being present the question of enhancement was not in issue before the Court and the summary dismissal cannot be regarded as an adjudication on the question of enhancement. That question not having been put in issue and not having been decided by the High Court, the finality attaching to the summary dismissal as against the accused does not affect the position. This, I apprehend, is the true distinction between a summary dismissal of an appeal or revision and a dismissal of it after a full hearing. The cases of Emperor v. Jorabhai (supra) and the other cases following it overlooked this vital distinction as also its effect on the new statutory right conferred on the accused person by section 439(6) and they cannot be accepted as correct decisions. In those cases where the appeal or revision filed by the accused had been dismissed after a full hearing in the presence of the State and where there was no application by the State or other interested party for enhancement of sentence during the pendency of that appeal or revision it should have been held that the dismissal must be regarded as a judgment which was final as against both parties on both points, conviction and sentence and there could be no further application for the enhancement of sentence and consequently no question of the accused having a further opportunity

of showing cause against his conviction could arise. In the cases where the appeal or revision filed by the accused had been summarily dismissed without notice to the respondent, it should have been held that although such dismissal was final as against the accused it did not preclude the State or the complainant, who was not a party to the dismissal, from applying for enhancement of sentence and that as soon as an application for enhancement was made subsequently and a notice was issued to the accused, the latter, faced with the risk of having his sentence enhanced, at once became entitled, under section 439(6), in showing case against the enhancement of sentence, also to show cause against his conviction. The Lahore Full Bench case has decided, inter alia that while the dismissal of the accused's revision application in limine does not prevent the State from subsequently applying for enhancement of the sentence, section 439(6) gives the accused a fresh right to challenge his conviction when a notice for enhancement is issued to him. That part of the decision may well be sustained on this ground as explained above but, with great respect, I do not agree with their view that the accused in that case had the second right because the summary dismissal of his revision was not a judgment at all or was not final even as regards him. The Rajasthan High Court's decision in so far as it extended the principle to the dismissal of a jail appeal without hearing the accused or his pleader under section 421 may also be supported on the ground I have mentioned. A Bench of the Lahore High Court in The Crown v. Ghulam Muhammad (Pak. L.R. [1950] Lah. 803) has held that where the accused's revision application had been dismissed on notice to the respondent and after a full hearing and the State subsequently applied for enhancement of sentence, the accused person could again show cause against his conviction. With great respect I think that the better reasoning would have been to say that such a dismissal of the revision after a full hearing was a judgment final against both parties on both points of conviction and sentence and that as the State did not, during the pendency of that revision, apply for revision it had, after that dismissal which became a final judgment, no right subsequently to apply for enhancement of sentence and consequently no notice under section 439(2) could issue and no question could arise for the accused person asserting his right under section 439(6).

For reasons discussed above I have to hold that the summary dismissal of the appeal filed by the appellant in the High Court was a judgment of conviction by the High Court and was final so far as the appellant was concerned and he could not initiate any further revision application either against his conviction or for reduction of sentence after that dismissal but that it was not final so far as the State was concerned and the State was entitled to apply in revision for enhancement of sentence. For reasons already stated I must further hold that as soon as the State applied for enhancement and a notice was issued on the appellant he became entitled under section 439(6) to again challenge his conviction. As I have said this sub-section gives a new and valuable weapon of defence to an accused person who is placed in fresh jeopardy by reason of an enhancement application having been filed against him and a notice to show cause having been issued to him. I find nothing in sections 369 and 430 to cut down that right. The previous dismissal of his appeal had no bearing on the new situation created by the enhancement application which the Legislature, in enacting section 439(6), may well and properly have thought to be sufficiently serious to deserve and require a thorough re-examination by the High Court of the conviction itself in this new context. There is nothing in principle that I can see which should prevent that sub-section from giving a fresh right to the accused whose appeal or revision has been summarily dismissed to defend himself by challenging his conviction when a notice for enhancement is issued to him.

In my judgment, for the reasons stated above, this appeal should be allowed and the matter should go back to the High Court so that the State's application for enhancement may be dealt with according to law after giving the appellant an opportunity to show cause against his conviction.

BHAGWATI J.,

Delivered the Judgment of Bhagwati and Imam, JJ. - This appeal on certificate under article 134(1)(c) of the Constitution raises an important question as to the right of a convicted person to show cause against his conviction while showing cause why his sentence should not be enhanced under section 439(6) of the Criminal Procedure Code.

The appellant was charged before the Presidency Magistrate, 13th Court, Bombay with having committed an offence punishable under section 66(b) of the Bombay Act XXV of 1949 inasmuch as he was found in possession of one bottle of Mac Naughtons Canadian Whisky (Foreign) containing 8 drams valued at Rs. 20. He was convicted by the learned Presidency Magistrate and was sentenced to imprisonment till the rising of the Court and a fine of Rs. 250 in default rigorous imprisonment for one month. He presented his petition of appeal to the High Court of Judicature at Bombay through his advocate. This petition of appeal was however summarily dismissed by the High Court after hearing the advocate on the 19th January 1953. On the 18th May 1953 a criminal revision application for enhancement of sentence was filed by the State and a rule was granted by the vacation Judge on the 12th June 1953. This rule came for hearing and final disposal before a Division Bench of the High Court on the 26th August, 1953. After hearing the Government Pleader in support of the rule the Court was not satisfied that there was a case for enhancement of sentence. The learned counsel for the Appellant then wanted to argue for an acquittal relying upon the provisions of section 439(6) of the Criminal Procedure Code. Relying however upon the decision of the Bombay High Court in Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 788), and Emperor v. Koya Partab ([1930] 32 Bom. L.R. 1286), as also Emperor v. Inderchand ([1934] 36 Bom. L.R. 954), the Court did not allow the learned counsel to argue that the order of conviction itself could not be sustained. The application for enhancement of sentence was thereupon dismissed and the rule was discharged. The appellant applied for leave to this Court on the 15th October, 1953. The Division Bench of the High Court, hearing the application stated the point which arose for determination as under :-

> "Whether a summary dismissal of an appeal preferred by an accused person precludes him from taking advantage of the provisions of section 439(6) of the Criminal Procedure Code, when he is subsequently called upon to show cause why the sentence imposed upon him should not be enhanced."

It pointed out that the consistent view taken by the Bombay High Court in this matter had been accepted by the Allahabad and the Patna High Courts in Emperor v. Naubat (I.L.R. 1945 Allahabad 527) and Ramlakhan Chaudhury v. Emperor ([1931] I.L.R. 10 Patna 872) but the view taken by the Lahore High Court in emperor v. Atta Muhammad ([1943] I.L.R. 25 Lahore 391 (F.B.), though not directly in point prima facie lent support to the contention urged by the learned counsel for the Appellant. A certificate was therefore granted to the Appellant that it was fit case for appeal to this Court.

It will be convenient at this stage to briefly indicate the relevant sections of the Criminal Procedure Code which will fall to be considered. Section 417 provides for an appeal on behalf of the State Government to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Sections 419, 420, 421, 422 and 423 prescribe the procedure in cases of appeals. Section 419 deals with petitions of appeal presented by the appellant or his pleader and section 420 with petitions of appeal presented when the appellant is in jail. Section 421 provides for summary dismissal of these appeals if the Appellate Court considers that there is no sufficient

ground for interfering, save that no appeal presented by the appellant or his pleader is to be dismissed unless the appellant or his pleader had a reasonable opportunity of being heard in support of the same, and the Court might also before dismissing an appeal summarily call for the record of the case though not bound to do so. If the Appellate Court does not dismiss the appeal summarily, notice of appeal is to be given to the appellant or his pleader of to such officer as the State Government may appoint in this behalf, under section 422 and the powers of the Appellate Court in dismissing the appeal are laid down in section 432, the only relevant provision for the present purpose being that in an appeal from a conviction the Appellate Court might with or without the reduction in sentence and with or without altering the finding alter the nature of the sentence but..... not so as to enhance the same. Section 430 incorporates the rule as to the finality of the judgments and orders passed by an Appellate Court upon appeal except in cases provided for in section 417 which relates to appeals on behalf of the Government in cases of acquittal and Chapter XXXII which relates to reference and revisional powers inter alia by the High Court to call for the records of the inferior criminal courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Courts. Section 438 provides for a reference by the lower Appellate Court to the High Court recommending that a sentence which has been imposed on a convicted person be reversed or altered. Section 439 with which we are immediately concerned is couched in the following terms :-

> (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal of sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposes of in manner provided by section 429.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has an opportunity of being heard either personally of by pleader in his own defence.
>
> #.....##
>
> (5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.
>
> (6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Section 440 lays down that no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision provided however that the Court may if it thinks fit, when exercising such powers hear any party either personally or by pleader and nothing in that section shall be deemed to affect section 439(2) above.

A person convicted of an offence may file in the High Court a petition of appeal or an application

for revision challenging his conviction and the sentence passed upon him. The petition of appeal may be presented by him from jail or may be presented by him to the High Court in person or through his pleader. An application for revision also may be similarly presented by him to the High Court. A petition of appeal presented by him from jail or presented by him in person or through his pleader as aforesaid may be summarily dismissed by the High Court after perusing the same if it considers that there is no sufficient ground for interfering, the latter after giving him or his pleader a reasonable opportunity of being heard in support of the same and in appropriate cases after calling for the record of the case. A notice of appeal may issue only if the High Court does not dismiss the appeal summarily and in that event only there would be a full hearing of the appeal in the presence of both the parties. In the case of an application for revision also the same may be dismissed summarily and without even hearing the party personally or by pleader. If however the Court deems fit to issue notice to the opposite party there would be a full hearing in the presence of both the parties. These proceedings would normally be concerned with the question whether the conviction can be sustained and the sentence passed upon the convicted person be set aside or reduced. There would be no question here of the enhancement of the sentence. The question of enhancement of the sentence would only arise when the High Court in exercise of its revisional jurisdiction under section 439(1) though it necessary to issue a notice for enhancement of sentence to the convicted person. Even though the Court exercising its powers of revision would not be bound to hear any party personally of by pleader no order under section 439(1) enhancing the sentence could be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence. In that event simultaneously with the opportunity given to him under sub-section (2) of showing cause why his sentence should not be enhanced he would be entitled in showing cause also to show cause against his conviction by virtue of the provision of section 439(6).

The exercise of this right of also showing cause against his conviction may arise in 4 different types of cases :

(1) Where his petition of appeal has been summarily dismissed either without hearing him of after hearing him or his pleader as the case may be;

(2) when his appeal has been dismissed after a full hearing following upon the notice of appeal being issued to the opposite party;

(3) When his application for revision has been summarily dismissed either without hearing him or after hearing him or his pleader as the case may be; and

(4) Where his application for revision has been dismissed after a full hearing following upon a notice issued to the opposite party.

When the High Court issues a notice for enhancement of sentence it is exercising its revisional jurisdiction and the question that arises for consideration is whether in one or more of the cases above referred to the High Court has jurisdiction to issue the notice of enhancement of sentence and the convicted person is entitled while showing cause why his sentence should not be enhanced also to show cause against his conviction.

The view taken by the Bombay High Court in the cases noted above has been that in all the four cases mentioned above the accused has had an opportunity of showing cause against his conviction and that he is not entitled to a further or second opportunity of doing so while showing cause why

his sentence should not be enhanced. It has not made any distinction between the exercise of appellate or revisional jurisdiction by the High Court nor between appeals or revision applications dismissed summarily or in limine and appeals or revision applications dismissed after a full hearing in the presence of both the parties. It has also extended the same principle to a reference made under section 438 and an order passed by the High Court thereupon - "No order on reference," without even issuing notice to the applicant at whose instance the Sessions Judge made the reference. (Vide Emperor v. Nandlal Chunilal Bodiwala ([1945] 48 Bombay L.R. 41 (F.B.))). The Allahabad and the Patna High Courts have followed this view of the Bombay High Court in the decisions above referred to and the Lahore High Court in Emperor v. Dhanalal ([1928] I.L.R. 10 Lahore 241) also followed the same. But this decision of the Lahore High Court was overruled by a Special Bench of that Court in Emperor v. Atta Mohammad ([1943] I.L.R. 25 Lah. 391 (F.B)). The Special Bench held that the exercise of revisional jurisdiction by the High Court is entirely discretionary, that an application for revision is entertained as a matter of favour, that no party is entitled to be heard either himself or by pleader when the Court is exercising its revisional jurisdiction and that therefore a dismissal of an application for revision in limine tantamounts to a refusal by the Court to exercise its revisional jurisdiction and the convicted person under those circumstances is at all events entitled while showing cause why his sentence should not be enhanced also to show cause against his conviction. It went to the length of holding that section 439(6) confers upon the convicted person an unfettered and unlimited right of showing cause against his conviction, which right cannot be taken away unless there is a judgment in rem which only would operate as a bar to the decision of the same matter when it arises in the exercise of what is in effect the exercise of the ordinary appellate jurisdiction. The Rajasthan High Court in State v. Bhawani Shankar (I.L.R. [1952] 2 Rajasthan 716) has drawn a distinction between cases where the accused has not been heard at all and given no opportunity to show cause against his conviction his jail appeal having been dismissed under section 421 or his revision application having been dismissed without hearing him and cases where he has already been heard and given an opportunity to show cause against his conviction whether it be in appeal or in revision and whether his dismissal is summary or on the merits and held that in the former cases he is entitled to ask the Court to hear him and thus allow him to show cause against his conviction under section 439(6) if a notice of enhancement is issued to him.

The principle as to the finality of criminal judgments has also been invoked while considering this question. This principle has been recognised by this Court in Janardan Reddy & Others v. The State of Hyderabad & Others (1951 S.C.R. 344) at page 367 where Fazl Ali, J., observed :-

> "It is true that there is no such thing as the principle of constructive res judicata in a criminal case, but there is such a principle as finality of judgments, which applies to criminal as well as civil cases and is implicit in every system, wherein provisions are to be found for correcting errors in appeal or in revision. Section 430, Criminal Procedure Code..... has given express recognition to this principle of finality by providing that "Judgments and orders passed by an Appellate Court upon Appellate Court upon appeal shall be final, except in cases provided for in section 417 and Chapter XXXII"."

Section 417 relates to appeals on behalf of Government in cases of acquittal by any Court other than a High Court and Chapter XXXII relates to reference and revision which also are powers exercised by the High Court over the judgments or orders of inferior Courts, thus excluding from the purview of this exception all judgments and orders passed by the High Court as an Appellate Court. Section 430 does not in terms give finality to the judgments of the High Court passed in exercise of its revisional jurisdiction, but the same principle would apply whether the High Court is exercising its

appellate jurisdiction or its revisional jurisdiction, because in either case the High Court which is the highest Court of Appeal in the State would have pronounced its judgment, which judgment would replace the judgment of the lower Court and would be final. Even while exercising its revisional powers under section 439 the High Court exercises any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 and it is in effect an exercise of the appellate jurisdiction though exercised in the manner indicated therein. This principle of finality of criminal judgments therefore would equally apply when the High Court is exercising its revisional jurisdiction. Once such a judgment has been pronounced by the High Court either in the exercise of its appellate or its revisional jurisdiction no review or revision can be entertained against that judgment and there is no provision in the Criminal Procedure code which would enable even the High Court to review the same or to exercise revisional jurisdiction over the same. The judgment of the High Court would replace that of the lower Court which would no longer be subsisting but would be replaced by the High Court judgment and thus it is only the High Court judgment which would be final and would have to be executed in accordance with law by the Courts below. Section 425 requires that whenever a case is decided on appeal by the High Court it should certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed and the Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of High Court and, if necessary, the record shall be amended in accordance therewith. Section 442 similarly provides that when a case is revised under Chapter XXXII by the High Court it shall in the same manner certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith. These provisions are enacted because the High Court itself does not execute or carry into effect the sentences or orders passed against the convicted persons but the work of such execution has necessarily to be done in conformity with the sentences or orders passed by the High Court by the Courts which originally passed the same. Nevertheless the latter Courts execute or carry into effect the sentences or orders which are ultimately passed by the High Court and are invested with finality. In these cases there is no occasion at all for the exercise of the revisional powers by the High Court under section 439(1) of the Criminal Procedure Code. That jurisdiction can only be exercised by the High Court when the record of the proceedings of Subordinate Courts has been called for by itself or the case has been reported to it for orders or has otherwise come to its knowledge and the High Court suo motu or on the application of the party interested thinks it fit to issue a notice for enhancement of sentence. This is a clear exercise of the revisional jurisdiction of the High Court and can be exercised by it only qua the judgments of the lower Courts and certainly not qua its own judgments which have replaced those of the lower Courts.

The Criminal Procedure Code unlike the Civil Procedure Code does not define "judgment" but there are observations to be found in a Full Bench decision of the Madras High Court in Emperor v. Chinna Kaliappa Gounden and another ([1905] I.L.R. 29 Mad. 126), discussing the provisions of section 366 and section 367 of the Criminal Procedure Code and laying down that an order of dismissal under section 203 is not a judgment within the meaning of section 369. The principle of autrefois acquit also was held not to apply as there was no trial when the complaint was dismissed under section 203 with the result that the dismissal of a complaint under section 203 was held not to operate as a bar to the rehearing of the complaint by the same Magistrate even when such order of dismissal had not been set aside by a competent authority. Section 366 lays down what the language and contents of a judgment are to be and section 367 provides that the judgment is to contain the decision and the reasons for the decision and unless and until the judgment pronounced by the Court

complied with these requirements it would not amount to a judgment and such a judgment when signed would not be liable to be altered or reviewed except to correct a clerical error by virtue of the provisions of section 369 save as therein provided. These observations of the Madras High Court were quoted with approval by Sulaiman, J., in Dr. Hori Ram Singh v. Emperor (A.I.R. 1939 Federal Court 43). He observed that the Criminal Procedure Code did not define a judgment but various sections of the Code suggested what it meant. He then discussed those sections and concluded that "judgment" in the Code meant a judgment of conviction or acquittal. Reference was then made to the observations of Sri Arnold White, C.J., in Emperor v. Chinna Kaliappa Gounden & another ([1905] I.L.R. 29 Mad. 126) which were followed by another Division Bench of the Madras High Court in Emperor v. Maheshwara Kondaya ([1908] I.L.R. 31 Madras 543) and it was held that an order of discharge was not a judgment as "a judgment is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused." A Full Bench of the Bombay High Court in Emperor v. Nandlal Chunilal Bodiwala ([1945] 48 Bom. L.R. 41 (F.B.)) pronounced that a judgment is the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments. It was pointed out that sections 366 and 367 applied to the judgments of the trial Court and section 424 dealing with the judgments of the Appellate Courts provided that the rules relating to the judgments of a Trial Court shall apply so far as may be practicable to the judgment of any Appellate Court other than a High Court. It followed therefore that there was no definite rule as to what the judgment of a High Court acting in its appellate as well as its revisional jurisdiction should contain. It was quite natural because the judgment of the High Court in its criminal jurisdiction was ordinarily final and did not therefore require the statement of any reasons whether the High Court was exercising its appellate or revisional jurisdiction. The judgment howsoever pronounced was however the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments and would therefore either be a judgment of conviction or acquittal and where it would not be possible to predicate of the pronouncement that it was such an expression of opinion the pronouncement could certainly not be taken as the judgment of the High Court.

A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would certainly be arrived at after due consideration of the evidence and all the arguments and would therefore be a judgment and such judgment when pronounced would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below. When however a petition of appeal presented by a convicted person from jail is summarily dismissed under section 421 or a revision application made by him is dismissed summarily or in limine without hearing him or his Pleader what the High Court does is to refuse to entertain the petition of appeal or the criminal revision and the order passed by the High Court - "dismissed or rejected" cannot be said to be the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments. It is a refusal to admit the appeal or the criminal revision so that notice be issued to the opposite party and the matter be decided after a full hearing in the presence of both the parties. It would be only after the appeal or the criminal revision was admitted that such a notice would issue and the mere refusal by the High Court to entertain the appeal or the criminal revision would certainly not amount to a judgment. The same would be the position when a reference was made by the lower Court to the High Court under section 438 and the High Court on perusing the reference made an order - "no order on the reference" - as the High Court on a consideration of the terms of the reference must have come to the conclusion that no prima facie case has been made out to warrant an interference on its part. If the High Court thought that it was a prima facie case for its interference it would certainly entertain

the reference and issue a notice to the parties concerned to show cause why the judgment and order passed by the lower Court should not be revised.

When a petition of appeal is presented to the High Court by the convicted person or his pleader section 421 provides that no such appeal should be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same and the High Court might before dismissing an appeal under that section, call for the record of the case but would not be bound to do so. Even in such a case the hearing accorded to the appellant or his pleader would be with a view to determine whether there was a prima facie case made out to warrant its interference in appeal. The appellant or his pleader would be heard in support of that position and if he satisfied the High Court that there was a prima facie case for its interference the High Court would admit the appeal and order a notice to issue to the opposite party in which event the appeal would be decided after a full hearing in the presence of both the parties. The calling for the records of the case also though not compulsory but discretionary with the Court would be for this very purpose, viz., to determine whether a prima facie case for its interference was made out. The whole purpose of the hearing accorded to the appellant or his pleader even after calling for the records of the case would be to determine whether a prima facie case for its interference was made out and it would not be within the province of the Court at that stage to fully consider the evidence on the record and hear arguments from the appellant or his pleader with a view to determine whether the conviction could be sustained or the sentence passed upon the accused could be reduced. The setting aside of the conviction and the reduction, if any, in the sentence could only be determined by the Court after notice was issued to the opposite party and a full hearing took place in the presence of both the parties. Even in the case of a summary dismissal of a petition of appeal under these circumstances the position would certainly not be any different from that which obtains in the case of a summary dismissal of the petition of appeal presented by the convicted person from jail or the summary dismissal of an application for criminal revision made by him or on his behalf to the High Court. In all these cases there will be no judgment of the High Court replacing the judgment of the lower Court and the action of the High Court would only amount to a refusal by the High Court to admit the petition of appeal or the criminal revision and issue notice to the opposite party with a view to the final determination of the questions arising in the appeal or the revision. The order dismissing the appeal or criminal revision summarily or in limine would no doubt be a final order of the High Court not subject to review or revision even by the High Court itself but would not tantamount to a judgment replacing that of the lower Court. The convicted person would be bound by that order and would not be able to present another petition of appeal or application for criminal revision challenging the conviction or the sentence passed upon him by the lower Court. But such order would not have the effect of replacing the judgment or order of the lower Court which would in that event be subject to the exercise of revisional jurisdiction by the High Court under section 439 of the Criminal Procedure Code at the instance of the State or an interested party. In the cases (1) & (3) noted above therefore there being no judgment of the High Court replacing the judgment of the lower Court section 439(1) would operate and the High Court in exercise of its revisional jurisdiction either suo motu or on the application of the interested party would be in a position to issue the notice of enhancement of sentence which would require to be served on the accused under section 439(2) so that he would have an opportunity of being heard either personally or by pleader in his own defence. In that event the convicted person in showing cause why his sentence should not be enhanced would also be entitled to show cause against his conviction.

It follows therefore that in the case of a summary dismissal or a dismissal in limine of petitions of appeal or applications for criminal revision even if the convicted person or his pleader has been heard by the High Court with a view to determine if there is a prima facie case for its interference,

the convicted person to whom an opportunity has been given under section 439(2) of showing cause why his sentence should not be enhanced would in showing cause be entitled also to show cause against his conviction. The same would also be the position when a reference made by the lower Court to the High Court under section 438 of the Criminal Procedure Code is rejected by the High Court without issuing notice to the parties concerned by merely ordering - "no order on the reference." In cases where the petition of appeal or the application for criminal revision is admitted by the High Court and a notice is issued to the opposite party and the High Court maintains the conviction with or without reducing the sentence passed upon the accused the judgment of the High Court in the exercise of its appellate or revisional jurisdiction would replace the judgment of the lower Court and there would be no occasion at all for the exercise by the High Court of its revisional powers under section 439(1) which can only be exercised qua the judgments of the lower Courts and certainly not qua its own judgments. The cases (2) & (4) noted above would therefore be outside the purview of section 439(1). If that is so there would be no question of giving the accused an opportunity of being heard either personally or by pleader in his defence under section 439(2) and the provisions of section 439(6) would certainly not come into operation at all. If no notice of enhancement of sentence could issue under these circumstances no question at all could arise of the convicted person showing cause why his sentence should not be enhanced and being entitled in showing cause also to show cause against his conviction.

It follows by way of a necessary corollary that no notice for enhancement of sentence can be issued by the High Court when a judgment is pronounced by it after a full hearing in the presence of both the parties either in exercise of its appellate or its revisional jurisdiction. Such notice for enhancement of sentence can be issued by it either suo motu or at the instance of an interested party when the judgment of the lower Court subsists and is not replaced by its own judgment in the exercise of its appellate or its revisional jurisdiction. When the judgment of the lower court has been under its scrutiny on notice being issued to the opposite party and on a full hearing accorded to both the parties notice for enhancement of sentence can only be issued by it before it pronounces its judgment replacing that of the lower Court. When such hearing is in progress it is incumbent upon the High Court or the opposite party to make up its mind before such judgment is pronounced whether a notice for enhancement of sentence should issue to the accused. There would be ample time for the opposite party to make up its mind whether it should apply for a notice of enhancement of the sentence. The High Court also on a perusal of the record and after hearing the arguments addressed to it by both the parties would be in a position to make up its mind whether it should issue such notice to the accused. But if neither the opposite party nor the High Court does so before the hearing is concluded and the judgment is pronounced it will certainly not be open to either of them to issue such notice for enhancement of sentence to the accused, because then the judgment of the High Court in the exercise of its appellate or revisional jurisdiction would replace that of the lower Court and section 439(1) would have no operation at all. Even in the case of a reference by the lower Court under section 438 of the Criminal Procedure Code the High court if it did not summarily reject such a reference would issue notice to the parties concerned and then there would be occasion for it either suo motu or on the application of an interested party to issue a notice of enhancement of sentence before the hearing was concluded and a judgment was pronounced by it. The procedure obtaining in the several High Courts to the effect that notice for enhancement of sentence can issue even after the appeal or the application for criminal revision is disposed of by the High Court and judgment pronounced thereupon is not correct and is contrary to the true position laid down above.

It was contended that the non-obstante clause in section 439(6), viz."notwithstanding anything contained in this section" was meant to confer upon the convicted person a right to show cause

against his conviction in those cases where a notice to show cause why his sentence should not be enhanced was issued against him, whatever by the circumstances under which it might have been issued. Once you had a notice for enhancement of sentence issued against the convicted person this right of showing cause against his conviction also accrued to him and that right could be exercised by him even though he had on an earlier occasion unsuccessfully agitated the maintainability of his conviction either on appeal or in revision. This non-obstante clause could not, in our opinion, override the requirements of section 439(1) which provides for the exercise of revisional powers by the High Court only qua the judgments of the lower courts. Section 439(6) would not come into operation unless a notice for enhancement was issued under section 439(2) and a notice for enhancement of sentence under section 439(2) could not be issued unless and until the High Court thought it fit to exercise its revisional powers under section 439(1) qua the judgments of the lower Courts. The High Court has no jurisdiction to exercise any revisional powers qua its own judgments or orders, the same being invested with finality and otherwise being outside the purview of the exercise of its revisional jurisdiction, and the only purpose of the non-obstante clause in section 439(6) can be to allow the convicted person also to show cause against his conviction when he is showing cause why his sentence should not be enhanced in spite of the prohibition contained in section 439(5). Where an appeal lies under the Code and no appeal is brought no proceedings by way of revision can be entertained at the instance of the party who could have appealed. If the convicted person could have filed an appeal but had failed to do so he could certainly not approach the High Court in revision and ask the High Court to set aside his conviction. If he could not file any application in revision he could not show cause against his conviction under section 439(1) of the Criminal Procedure Code and it was in order to remove this disability that the non-obstante clause in section 439(6) was enacted so that when the High Court was exercising its revisional jurisdiction the convicted person could show cause against his conviction in spite of the fact that otherwise he could not have been able to do so, he not having appealed when an appeal lay and therefore not being entitled to file an application in criminal revision and challenge the validity or maintainability of his conviction. Section 439(6) therefore confers on the convicted person a right which he can exercise in the event of a notice for enhancement of sentence being issued against him in the exercise in the revisional jurisdiction by the High Court in spite of the fact that he was not entitled to question the validity or maintainability of his conviction in a substantive application for criminal revision filed by him only if the High Court exercising its revisional jurisdiction under section 439(1) thinks it fit to issue a notice of enhancement of sentence against him under section 439(2) and in that event he has the right also to show cause against his conviction when showing cause why his sentence should not be enhanced.

We shall now review the decisions of the various High Courts to which our attention has been drawn by the learned counsel appearing before us. Turning first to the decisions of the Bombay High Court we were referred to Emperor v. Chinto Bhairava ([1908] I.L.R. 32 Bom. 162), a decision given in the year 1908 which recognised the invariable practice of that Court for over 25 years according to which the accused in showing cause why the sentence should not be enhanced was not allowed to discuss the evidence and satisfy the Court that he had been wrongly convicted. The practice of the Court in such cases was to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. It was open to the accused to apply for revision of the conviction, but having failed to avail himself of that, he could not be permitted to assail the conviction in a proceeding where the sole question was whether the sentence passed by the lower Court was adequate or not. It may be noted that this decision was in the year 1908 long before the amendment of section 439 of the Criminal Procedure Code by Act XVIII of 1923 by adding sub-section (6) thereto.

The next decision to which we were referred was Emperor v. Mangal Naran ([1924] 27 Bom. L.R. 355). In that case simultaneously with the admission of an appeal filed by the accused the Court issued a notice for enhancement of sentence. When the appeal and the notice came for hearing together before the Division Bench the Court observed that such a practice was not desirable. It was likely to produce an impression on the mind of an illiterate accused in jail that it was proposed to enhance the sentence because he had appealed. MacLeod, C.J., there expressed an opinion that if after an appeal had been heard on its merits and dismissed a notice to enhance the sentence was issued, the accused had still the right to show cause against his conviction, though any attempt to set aside the conviction would not have much chance of success. He however expressed his preference in favour of the old practice, viz. first to deal with the appeal and then to consider whether a notice to enhances should issue. No question had arisen for consideration of the Court in that case as to the true construction of the provision of section 439(6) of the Criminal Procedure Code and the only question considered by the Court there was what should be the proper procedure to be adopted when issuing a notice for enhancement of sentence, whether is should be issued simultaneously with the admission of the appeal or after the appeal was finally heard and disposed of.

This opinion expressed by MacLeod, C.J., was therefore treated as obiter in Emperor v. Jorabhai Kisanbhai ([1926] I.L.R. 50 Bom. 783). The question that arose for consideration of the Court in that case was whether after an appeal of an accused person against his conviction and sentence had been dismissed by a Division Bench of the High Court and a notice to enhance the sentence was issued on an application on behalf of the Government the application for enhancement of sentence could be heard on its merits by another Division Bench of the High Court treating the conviction as correct or the accused was under such circumstances not entitled under section 439(6) to be re-heard on the merits of his conviction. The appeal filed by the accused against his conviction and sentence had been dismissed on the 7th April, 1926. After judgment was delivered by the Court, the Government Pleader applied orally for issued of a notice for enhancement and that application was granted. The application was heard on the 17th June, 1926 and it was urged on behalf of the accused that the only proper procedure was to issue a notice for enhancement of sentence before the appeal had been actually disposed of and that once the appeal was disposed of by the Court there was no legal power to enhance the sentence under section 439 of the Criminal Procedure Code. That contention was negatived the Court observing that so far as the point of procedure was concerned there was no hard and fast rule as to the appropriate time for the issue of notice of enhancement of sentence by the High Court and resorting to the principle of the finality of judgments as regards the accused being concluded by the judgment of the High Court dismissing his appeal and confirming the sentence passed upon him. The judgment there was interpreted as confirming the conviction and rejecting the appeal as to the sentence in the sense that it saw no reason to reduce it and that was not treated as a decision that the sentence should not be enhanced if a proper procedure was taken such as the Code allowed for the purpose and therefore so far as the judgment went there was nothing which in any way tied the hands of the Court. Section 369 and 430 of the Criminal Procedure Code were referred to and the Court held that the observations of MacLeod, C.J., in Emperor v. Mangal Naran ([1924] 27 Bom. L.R. 355) above referred to were obiter dicta not binding upon them and the application must be heard on the merits treating the conviction as correct in view of the dismissal of the appeal.

It is no doubt true as observed by Madgavkar, J., in regard to the practice as to the proper time for issuing of the notice of enhancement that the question of adequacy of punishment is, in the first instance, a matter for the Government and for the District Magistrate. From the time when the sentence is passed, and at all events up to the time when an appeal is admitted and notice is received, it is open to Government to consider the sufficiency of a sentence and before hearing of

the appeal, to apply to the High Court for enhancement of the sentence if they are so advised. In that event the appeal as well as the notice of enhancement would be heard together and the Court hearing the appeal would apply its mind not only to the question whether the conviction should be confirmed but also to the question whether the sentence should be reduced or enhanced as the case may be. It is only in rare instances that the High Court considers for itself the question of enhancement of sentence and only if no action has been taken by the Government and if the High Court thinks that the interests justice imperatively demand it. In such a case it would be a matter for consideration by the High Court whether it should issue notice at the very time of the admission or whether it should do so while disposing of the appeal on the merits as to the conviction. The observation of the learned Judge however in so far as they seem to suggest that the appeal should be disposed of first and the question of enhancement of sentence should be considered by the same Bench immediately afterwards or that the notice for enhancement could be issued by the Court after the disposal of the appeal on the merits as to conviction do not take into account the fact that after the judgment is pronounced and the conviction is confirmed involving as a necessary corollary there of the confirming of the sentence passed upon the accused also if the same is not reduced, the judgment of the High Court replaces that of the lower Court and the exercise of any revisional powers by the High Court by way of enhancement of the sentence is necessarily eschewed. These revisional powers could only be exercised by the High Court qua the judgment of the lower Court and once that judgment is replaced by the judgment of the High Court, the High Court has no further powers to review or revise its own judgment and enhance the sentence which is thus passed by it upon the accused. The principle as to the finality of judgments applied by the Court by virtue of the provisions of section 369 and section 430 of the Criminal Procedure Code should not have been confined merely to the question of confirming the conviction but also should have been extended to the confirming of the sentence is so far as the High Court did not see any reason to reduce the sentence already passed by the lower Court upon the accused. When the High Court hears the appeal on its merits it does not apply its mind only to the question whether the conviction should be confirmed but also applies its mind to the adequacy of the Sentence passed upon the accused by the lower Court. In thus applying its mind to the question of sentence it also considers whether the sentence passed upon the accused by the lower Court is adequate in the sense that it is either such as should be reduced or is such as should be enhanced. The questions of the reduction of the sentence of enhancement of the sentence are not to be viewed as if they fall into water-tight compartments and the mind of the Court hearing the appeal on merits is directed to the consideration of the matter in all its aspects including the confirming of the conviction and the reduction or enhancement of the sentence as the case may be. The principle of finality of judgments should therefore be extended not only to the question of the confirming of the conviction but also to the question as to the adequacy of the sentence, whether the sentence which is passed upon the accused by the lower Court Should be reduced, confirmed or enhanced. Once therefore the judgment of the High Court replaces that of the lower Court there is no question which can ever arise of the exercise by the High Court of its revisional powers under section 469(1) of the Criminal Procedure Code and the proper procedure therefore if the High Court throught it fit either suo motu or on the application of the interested party to issue the notice of enhancement of sentence, is to issue the said notice before the hearing of the appeal is concluded and the judgment of the High Court in appeal is pronounced. We are therefore of the opinion that the decision reached by the High Court of Bombay in Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) was not correct in so far as it held that the notice of enhancement could be issued by the High Court at the instance of the Government after the dismissal of the appeal on merits. The notice for enhancement issued in that case was not competent and should not have been issued at all by the High Court.

The decision in Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) was followed in Emperor v. Koya Partab ([1930] 32 Bom. L.R. 1286) which extended the same principle to an appeal which had been presented from jail and was summarily dismissed under section 421 of the Criminal Procedure Code. While dismissing the same the Court issued a notice for enhancement. When the notice came for hearing the accused contended that he was entitled to be heard on the merits as to whether he should have been convicted or not relying upon the provision of section 439(6). Beaumont, C.J., relied upon the provisions of section 430 and observed that the accused was not at liberty to be heard on the merits. The judgment of the Court of Appeal dismissing the appeal on the 9th June 1930 was a final order which the Court was not at liberty to differ from and the non-obstante clause in section 439(6) did not entitle the accused to go behind section 430 and to show cause against his conviction after his appeal had been dismissed. The learned Chief Justice followed that decision in Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) and observed that the only distinction between that case and the one before him was that case had been heard on the merits and not summarily dismissed. But in his view that distinction was not one of principle. We are of the opinion that the order which had been pronounced by the Court of Appeal on the 9th June, 1930 was not a judgment of the High Court which replaced that of the lower Court and even though it might come within the description of an order within the meaning of sentence 430 it was not a judgment within the meaning of the term set out above and not being a judgment was no bar to the accused showing cause also against his conviction when showing cause also against the notice for enhancement. The matter was one falling within the category of case No. 1 noted above and it was open to the accused even though his petition of appeal from jail was summarily dismissed under section 421 to urge while showing cause against the notice of enhancement of sentence also to show cause against his conviction. This decision was therefore in our opinion incorrect and the accused ought to have been heard on the merits as to whether he should have been convicted or not.

Emperor v. Ramchandra Shankarshet Uravane ([1932] 35 Bom. L.R. 174) was a case where the High Court admitted the appeal and at the same time issued a notice to the accused for enhancement of sentence. The observations of MacLeod, J. in Emperor v. Mangal Naran ([1924] 27 Bom. L.R. 355) were followed in spite of the fact that they had been held obiter by the Division Bench of the Court in Emperor v. Jorabhai, ([1926] I.L.R. 50 Bom. 783) Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) was also referred to and it was held that it was neither necessary nor desirable for the High Court to issue a notice for enhancement of sentence at the time of admission of the appeal. It was however observed that it was open to consider the question of enhancement of sentence after the appeal had been heard. If those observations were meant to convey that the question of enhancement of sentence could be considered after the appeal had been disposed of and judgment was pronounced by the High Court we do not agree with the same. But if they were meant to convey that the High Court could hear the accused on the question of enhancement of the sentence at the same time when his appeal was heard, before pronouncement of the judgment on the question of the conviction and the sentence passed upon him, they were perfectly in order.

The decision in Emperor v. Inderchand ([1934] 36 Bom. L.R. 954) extended the principle enunciated in Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) further by applying it to a case where an application for revision by the accused against his conviction and sentence had been dismissed by the High Court. In that case the accused had filed an application for revision which was summarily dismissed by the Vacation Judge on the 30th April, 1954. After such summary dismissal of the application the Government filed the criminal revision application for enhancement of sentence. The Division Bench held that the criminal revision application of the accused having been fully disposed of by the learned Vacation Judge there was a valid order of dismissal, that section 430 debarred the accused from having that order of dismissal reviewed by the High Court

that the right conferred by section 439(6) could not give an accused person a right to be heard against his conviction if such a right was in conflict with the other provisions of the Code, that under section 369 the Court had no power to alter the decision of the learned Vacation Judge dismissing the revision petition filed by the accused and that if the accused had already unsuccessfully exercised his right of appeal or revision to the High Court he was not entitled in a subsequent application by the Government for enhancement of sentence to ask the High Court to go once more into the merits of the case and to set aside the conviction which the same Court had previously confirmed either in appeal or on a revision application. Divatia, J., was conscious of the somewhat anomalous position so far as the accused was concerned and referred to the observations of the Court in Emperor v. Babu Pandurang Mhaske ([1934] 36 Bom. L.R. 382) where it was stated and rightly that where the High Court itself wanted to enhance the sentence, in order that the accused might have the right to challenge his conviction before the same bench which was hearing either the appeal or the application for enhancement, it was proper that the application for enhancement should be heard before the appeal was finally decided, so that the accused might be heard at the very time when the question of enhancement was before the Court. While approving of these observation the learned Judge however observed that it was possible only in a case where the High Court itself wanted to enhance the sentence and gave notice to the accused and not so in a case where Government approached and High court by way of a revisional application as it was entitled to do under section 439(1). Government might approach the High Court in revision under section 439(1) at any time within six months after the decision of the lower Court and in the meanwhile the accused might have come to the High Court and his application might have been rejected. That might result in this that the conviction might be confirmed by one Bench or a single Judge as might happen in a particular case and the application for enhancement might be heard by another Bench. But, so far as the provisions of the section were concerned, whatever might be the anomaly in this procedure, the learned Judge did not think that the inconvenience or hardship to the accused should lead the Court to construe section 439 of the Criminal Procedure Code in a manner which, according to the view of the learned Judge, was not intended by the Legislature. These observations however did not take count of the fact that if a petition of appeal or a criminal revision application filed by the accused was dismissed summarily or in limine there was no question of a judgment of the High Court replacing that of the lower Court and the order of the High Court merely amounted to a refusal by it to interfere either in the exercise of its appellate or revisional jurisdiction which order though final and not being susceptible of review or revision by the High Court itself, did not amount to a judgment of the High Court barring the application of section 439(1) of the Criminal Procedure Code. In that event the judgment of the lower Court not being replaced by a judgment of the High Court it could be the subject matter of criminal revision at the instance of the Government in the matter of the enhancement of the sentence and all the provisions of section 439 would then come into operation. The High Court would be bound then under section 439(2) to give an opportunity to the accused to be heard in his defence before the sentence passed upon him by the lower Court was enhanced and the accused would under section 439(6) be entitled in showing cause against the notice of enhancement also to show cause against his conviction. This decision of the High Court therefore was incorrect and the accused ought to have been allowed in spite of the summary dismissal of his application in revision to show cause against his conviction while showing cause against the notice for enhancement.

One more decision of the Bombay High Court may be referred to and that is Emperor v. Nandlal Chunilal Bodiwala ([1945] 48 Bom. L.R. 41 (F.B.). That was a case where the Sessions Judge of Ahmedabad had at the instance of the petitioner made a reference to the High Court recommending that the Additional Magistrate had no jurisdiction, power or authority to pass the order complained

against and that the High Court should quash the same. On the reference coming before the High Court the following order was passed without issuing notice :- "No order on this reference." The petitioner thereupon field a criminal revision application to the High Court praying that the order of the Additional District Magistrate be quashed. This revision application came for hearing before a Division Bench and the Court requested the Chief Justice to constitute a Full Bench to consider the following point :

> "When on a reference made by the Sessions Judge under section 438 of the Criminal Procedure Code, a Division Bench of this Court passes an order without issuing notice, viz., 'No order on this reference', whether the applicant at whose instance the Sessions Judge made the reference is entitled to make an application in revision to this Court in the same matter, in view of the provisions of section 369 of the Criminal Procedure Code ?"

The application was heard by a Full Bench and it was contended on behalf of the petitioner that when the High Court without issuing notice to the applicant disposed of the reference made by the Sessions Judge by stating "No order on the reference" there was no judgment given on the merits. The order of the Court only meant that the Court would not allow the matter to be brought before it on the recommendation of the Sessions Judge and merely disposed of it on that view. If a mere order of disposal of a reference or revision application amounted to a judgment the party in whose favour a reference was made by the Sessions Judge would be deprived of the right he had of approaching the High Court in revision against the order, if the Court disposal of the matter in the manner it had done in that case. This argument was repelled by the Full Bench. It held that section 369 of the Criminal Procedure Code debarred the petitioner from making the criminal revision application, that the order of the High Court passed upon the reference amounted to a judgment within the meaning of that term in section 369 of the Criminal Procedure Code and after it was signed it could not be altered or reviewed in a subsequent application for revision and that even though the Division Bench of the High Court passed the order "No order on this reference" without issuing notice to the applicant, the application in whose favour the Sessions Judge made a reference was not entitled to make an application in revision to the High Court in the same matter. Even though this conclusion was reached by the Full Bench they observed that they were not unaware that the applicant had a grievance that his position had been worsened and not improved by the Sessions Judge being in his favour, because if the recommendation of the Sessions Judge was turned down without hearing the petitioner, as had happened in that case he was worse off, while if the Sessions Judge would have been against him he could have still applied to the High Court in revision and got an opportunity to put his case before the High Court. This was recognised no doubt as an anomaly but it was caused by the provision or rule 26 of the Appellate Side Rules of the Bombay High Court which compelled a party to apply to a lower revisional Court before applying in revision to the High Court. This disability which the petitioner suffered from was emphasised in that if the Sessions Judge had dismissed his application he could then have applied to and argued his case before the High Court, but because the Sessions Judge was in his favour and had therefore got to make a reference to the High Court recommending it to set aside the order and because the High Court was not satisfied with the reasons for the recommendation, and disposed of it without issuing a rule, the petitioner was debarred from urging his arguments before the High Court. It might be that the reasons given by the Sessions Judge for the recommendation might be weak or might be insufficient, whereas the petitioner, if he appeared might be able to urge cogent and sufficient reasons for setting aside the original order. In spite of pointing out this disability the only recommendation which was made by the Full Bench was that the Rule 26 of the Appellate Side Rules should be properly amended so as to issue notice to all the parties concerned when a reference

was made by a Sessions Judge recommending the setting aside of an order of the Trial Court. We are of opinion that the Full Bench should not have stopped short at pointing out this disability which the applicant suffered from but should have gone further and held that the order passed by the High Court on the reference, though final under section 430 of the Criminal Procedure Code was not a judgment within the meaning of that term and therefore did not debar the applicant from making the criminal revision application which he did under section 439(1) of the Criminal Procedure Code. Such an order did not amount to a judgment within the definition thereof given by the Full Bench itself which was : "a judgment is the expression of the opinion of the Court arrived at after due consideration of the evidence and of the arguments" as pointed out earlier in the course of this judgment. We are of the opinion that this decision of the Bombay High Court was also incorrect.

Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) was followed by the Lahore High Court in Emperor v. Dhanalal ([1928] I.L.R. 10 Lah. 244). In that case a revision petition filed on a behalf of the convicted person was dismissed after hearing counsel. Subsequently a report of the Sessions Judge was received and the learned Judge who had dismissed the revision petition issued a notice for enhancement of sentence and the Court held that section 439(6) was meant to give an accused person to whom a notice for enhancement was issued and who had not appealed or if no appeal lay had not applied for revision of his conviction, an opportunity to question the correctness of his conviction if it was proposed to enhance his sentence. But if a petition for revision against his conviction by a convict had been rejected by a Judge of the High Court and a notice had subsequently been issued to him to show cause why his sentence should not be enhanced the convict was barred from showing cause against his conviction and the fact that the previous order dismissing the revision was passed without issuing notice to the opposite party made no difference to the position. The Court also invoked the principle of the finality of judgments and further held that the words "unless he had already done so" though not occurring at the end of the sub-section were to be presumed to be implied from the ordinary presumption as to the finality of orders in criminal revision proceedings. In arriving at this conclusion Addison, J., observed :-

> "In the present case there has been a judgment of this Court on the very full revision application brought by the convict. By that judgment the petition was dismissed and the conviction confirmed. Under section 369, Criminal Procedure Code that judgment cannot be reviewed. It is a final judgment of this Court, and in my opinion the provisions of sub-section (6), section 439, do not give the convict another opportunity in these circumstances to be heard as regards his conviction."

There was no justification whatsoever for reading the words "unless he had already done so" in the section and the reasoning adopted by the learned Judge in our opinion wrongly invested the order passed by the High Court in the exercise of its revisional jurisdiction dismissing the application without issuing a notice to the opposite party with the character of a judgment which could only be enjoyed by it if it had been pronounced after a full hearing in the presence of both the parties after notice issued to the opposite party. Then the pronouncement of the High Court would have been a judgment replacing the judgment of the lower Court and not subject to the exercise of any revisional jurisdiction under section 439(1) of the Criminal Procedure Code. Where the petition for revision against his conviction presented by the convict had been rejected by the High Court in limine the order passed by the High Court did not tantamount to a judgment which would debar the convict from showing cause against the conviction when showing cause against a subsequent notice for enhancement of sentence issued by the High Court.

The learned Judge further observed:

> "There appears to be no distinction between dismissing a revision petition in limine or after notice. The judgment is in either case an effective and final judgment of the Court. In this respect there is no difference between a revision petition and a memorandum of appeal..... In these circumstances I can see no force in the argument that an order dismissing a revision petition without issuing notice is different from an order after the issue of notice, or that there is any distinction between a judgment of this Court passed on the revision side and one on the appellate side."

While agreeing with the observations of the learned Judge that for the purposes of section 439(1) there was no distinction between a judgment of the High Court passed on the revision side and one on the appellate side we are of the opinion that there is a real distinction between orders dismissing a revision petition or a petition of appeal in limine without issuing notice to the opposite party and judgments pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after a full hearing in the presence of both the parties after the issue of notice. The latter are judgments in the true sense of the term which debar the exercise of revisional jurisdiction by the High Court under section 439(1) of the Criminal Procedure Code.

This decision of the Lahore High Court was how ever overruled by a Special Bench of that Court in Emperor v. Atta Mohammed ([1943] I.L.R. 25 Lah. 391 (F.B.)). A criminal revision application had been dismissed in limine and thereafter a notice for enhancement of sentence was issued by the High Court. The decision of that Court in Emperor v. Dhanalal ([1928] I.L.R. 10 Lah. 241) following Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) was cited as debarring the accused from showing cause against his conviction and Blacker, J., before whom the matter was argued in the first instance recommended a reference to a larger Bench and the reference came up for hearing and final disposal before a Special Bench of the Court. It was held that the accused was entitled to show cause against his conviction notwithstanding the fact that this petition for revision of the order by which he was convicted had already been dismissed in limine under section 435 of the Criminal Procedure Code. The question whether an order under section 435 was a judgment was discussed by Blacker, J., while pronouncing the judgment of the Special Bench. He referred to the case of Dr. Hori Ram Sigh v. Emperor (A.I.R. 1939 F.C. 43) above referred to and quoted with approval the observations of Sulaiman, J., that every order in a criminal matter was not a judgment and that 'judgment' in the Criminal Procedure Code meant a judgment of conviction or acquittal. Applying this definition the learned Judge observed :-

> "It will be seen that an order under section 435 can with difficulty be called a judgment. All that a Judge does at this preliminary stage is either to send for the records of the lower Court with a view to examining them under Section 439(1) or to refuse to do so. It is difficult to see how the latter can possibly be called a judgment of conviction. When such an order consists of the one word 'Dismissed' can it necessarily be taken as a judicial pronouncement that in the opinion of the Judge the respondent was rightly convicted upon the evidence ? It seems to me that all that it means is that the Judge sees no adequate ground disclosed in the petition or on the face of the judgment for proceeding further."

This reasoning in our opinion was quite sound. But the learned Judge proceeded further to make a distinction between the summary dismissal of a petition of appeal under Section 421 and the summary dismissal of a criminal revision application under section 435 stating that the reasons for which the High Court would summarily dismiss an appeal were very different from those for which

it would refuse to interfere in revision, and in the case of appeal it would only do so when the material before it was sufficient to satisfy it beyond any doubt of the accused's guilt, whereas, on revision the High Court would not interfere merely because it did not agree on every point with the Court below, as long as the Courts below have come to a reasonable decision on the evidence. This distinction in our opinion does not affect the position that the order pronounced by the High Court dismissing the petition of appeal or a criminal revision application in limine without issuing notice to the opposite party is merely an order dismissing the same on the ground that there is no prima facie case for interference of the High Court and does not amount to a judgment pronounced by the High Court after full hearing in the presence of both the parties which only can debar the High Court from exercising its revisional jurisdiction under Section 439(1). Mr. Justice Mahajan as he then was delivered a concurring judgment but went a step further and observed that the true interpretation of section 439(6) was that it gave an unlimited right to the accused to whom a notice of enhancement was issued under section 439(2) to show cause against his conviction and the Judge was bound to go into the evidence with a view to find for himself whether the conviction could be sustained. This right accrued to the convict on service of notice of enhancement of sentence and could not be negatived by anything that had preceded the issue of that notice. It was the Judge hearing the enhancement petition who had to give an opportunity to the convict to challenge his conviction before him and to satisfy him that the conviction was unsustainable. That Judge could not substitute for his satisfaction the satisfaction of some other Judge in the matter. It was a condition precedent to the passing of a prejudicial order against an accused person that he had another opportunity of establishing his innocence, even if he had failed to do so before. The learned Judge rightly observed that an order made in the exercise of an extraordinary discretionary jurisdiction, unless it be a judgment in rem, could not in any way operate as a bar to the decision of the same matter when it arose in the exercise of ordinary appellate jurisdiction, and that therefore an order dismissing a criminal revision application in limine could not amount to a judgment of the High Court. The learned Judge then invoked the principle of the finality of judgments and observed :-

> "On the other hand if the view be correct that all orders passed in exercise of revisional jurisdiction whether they be of dismissal of the petition in limine, or otherwise take away the right of the convict to challenge his conviction in view of section 369, Criminal Procedure Code as in such cases a decision given already cannot be altered or reviewed, then I do not see how for purposes of enhancement of the sentence, the previous decision can be altered. Any Judge deciding a petition for revision under section 439(1) must consider the propriety of the sentence as well as the propriety and legality of the conviction, and in my opinion he must be presumed to have done so. If a previous decision on the question of conviction bars the applicability of section 439(6), it also bars the power to enhance the sentence. Once it has been held that the sentence was proper, it cannot be enhanced. I have not been able to see the ratio decidendi of the decisions which take the view, that the question of enhancement of the sentence is something distinct and separate from that of conviction, and that the question of the adequacy and propriety of sentence which comes before the court on a petition for revision presented by the accused is a matter different from the matter of enhancement. The Judge has to see if a proper sentence has been passed before he decides the case, and the question whether a sentence passed is adequate or inadequate cannot be split up in two different compartments. The question is only one of the quantum of punishment and such a question can only be decided but once. Therefore in my view either there is no power of re-revision in

> the High Court, in that case there is no power to enhance the sentence on a separate petition made for the purpose; or there is such a power in that case it is available to the Crown as well as to the accused."

This reasoning again was in our opinion sound but led only to the conclusion that there was no power of re-revision in the High Court and in that case there was no power to enhance the sentence on a separate petition made for the purpose. The learned Judge therefore ought to have held that if the order dismissing the criminal revision petition in limine tantamounted to a judgment pronounced by the High Court it was not open to the High Court to issue a notice for enhancement of sentence subsequently under section 439(1) of the Criminal Procedure Code. Having held however that the order dismissing the criminal revision application in limine was merely an order and not a judgment pronounced by the High Court and also having held that the High Court was entitled to issue a notice for enhancement of sentence under section 439(1), under those circumstances the only logical conclusion to which the Court could come was that under section 439(6) the accused while showing cause against the enhancement of sentence was entitled also to show cause against his conviction. Mr. Justice Mahajan confined his decision only to the case of a dismissal of a criminal revision application in limine and left open the question whether a decision on the Appellate Side of the High Court would bar the exercise of the right under section 439(6) inasmuch as no arguments were heard on the point. The principle of this judgment in our opinion is not confined merely to cases where a criminal revision application has been dismissed in limine but also extends to cases where a petition of appeal whether presented from jail or presented to the Court by the appellant or his pleader has been similarly dimissed summarily or in limine without issuing notice to the opposite party and also to cases of references made by the lower Courts to the High Court where the High Court has merely passed an order without issuing notices, to any of the parties concerned - "no order on this reference."

The Patna High Court in Ramlakhan Chaudhury v. The King-Emperor ([1931] I.L.R. 10 Patna 872) followed both these decisions Emperor v. Jorabhai ([1926] I.L.R. 50 Bom. 783) and Emperor v. Dhanalal ([1928] I.L.R. 10 Lahore. 241) in holding that the dismissal of an appeal by the High Court did not debar it from subsequently enhancing the sentence in the exercise of revisional Jurisdiction after issuing notice to the accused. In that case an appeal had been dismissed after full hearing by the High Court. At the hearing of the appeal however the Court asked the counsel for the accused to show cause why the sentence passed upon them should not be directed to run consecutively thus in effect issuing a notice for enhancement of the sentence. When the matter came on for hearing it was contended on behalf of the accused that with the disposal of the appeal the Bench and indeed the High Court was functus officio and had no Jurisdiction to hear the matter at all. This contention was repelled by observing that the appellate judgment was not concerned with the question of enhancement of the sentence which only arose in the exercise of the revisional Jurisdiction and the sentence to be revised and enhanced was the sentence passed not by the High Court but by the Court of Sessions. These observations run counter to the observations of Mr. Justice Mahajan which we have quoted above and ignores the fact that once the High Court pronounced its judgment in the appeal after full hearing in the presence of both the parties the judgment of the High Court replaced that of the lower Court and the High Court had thereafter no power to issue a notice of enhancement of sentence purporting to exercise the revisional powers vested in it under section 439(1) of the Criminal Procedure Code which could be exercised only qua the judgments of the lower Courts and not its own judgments.

The Allahabad High Court also in Emperor v. Naubat (I.L.R. 1945 Allahabad 527) followed the decisions of that Court which had approved of and followed Emperor v. Jorabhai ([1926] I.L.R. 50

Bom. 783) and repelled the contention which had been urged on behalf of the accused that the application in revision filed by the Government for enhancement of their sentence was incompetent, because their appeal from their convictions had been dismissed by the Court and it was not open to them again to show cause against their convictions. The decisions above referred to were held by the Court to be an authority for the proposition that the Court could under the circumstances proceed to consider whether the sentence imposed upon the accused should be enhanced, even though it was not open to the accused to show cause against their conviction. This decision was in our opinion not correct for the simple reason that once the judgment of the Appellate Court replaced that of the lower Court it was not competent to the High Court to issue a notice for enhancement of sentence in the exercise of its revisional Jurisdiction under section 439(1) and no question could therefore arise of the accused being called upon to show cause why their sentence should not be enhanced.

The High Court of Rajasthan in The State v. Bhawani Shankar (I.L.R. [1952] 2 Rajasthan 716) tried to reconcile the various points of view above noted by laying stress on the aspect of the accused having had an opportunity to show cause against his conviction and it observed that where an accused person had already been heard and thus given an opportunity to show cause against his conviction, whether it be in appeal or in revision and whether the dismissal was summary or on the merits, he could not be heard against his conviction a second time under section 439(6) as the principle of finality of orders in criminal proceedings would apply. But if the accused had not been heard at all and given no opportunity to show cause against his conviction and his jail appeal had been dismissed under section 421 of the Criminal Procedure Code, or his revision had been dismissed without hearing, he was entitled to ask the Court to hear him and thus allow him to show cause against his conviction under section 439(6), if a notice of enhancement was issued to him. The real question however in our opinion is not whether an opportunity has been given to the accused to show cause against his conviction at any time but whether the High Court is entitled to exercise its revisional powers under section 439(1) and issue a notice of enhancement of sentence upon the accused. If the accused had an opportunity of showing cause against his conviction either in an appeal or a criminal revision application filed by him or on his behalf and the conviction was confirmed on a full hearing in the presence of both the parties after the issue of the requisite notice by the Court to the opposite party the judgment of the High Court would replace that of the lower Court which judgment could not be reviewed or revised by the High Court at all in exercise of its revisional powers under section 439(1). If however an order dismissing the petition of appeal or criminal revision application or even a reference made by the lower Court was made dismissing the same summarily or in limine without issuing notice to the opposite party or the parties concerned it would tantamount to the High Court not entertaining any of these proceedings on the ground that no prima facie case had been made out for the interference of the Court. If such a prima facie case had been made out the High Court would admit the appeal or the revision application or entertain the reference and hear the matter fully in the presence of both the parties, ultimately pronouncing its judgment which would take the place of the judgment of the lower Court which would certainly not be subject to the exercise of revisional Jurisdiction under section 439(1) of the Criminal Procedure Code. We are of the opinion that the conclusion reached by the High Court of Rajasthan was correct and the accused in that case was rightly allowed by it to show cause against his conviction in spite of his petition of appeal from jail having been dismissed by it summarily, though we differ from the reasoning adopted by the Court in reaching that conclusion. Section 439(6) gives the accused a right to show cause against his conviction. It does not merely give him an opportunity to show cause against the same. The opportunity is given to him to show cause against the enhancement of sentence under section 439(2) of the Criminal Procedure Code and once he has got that opportunity,

while showing cause against the enhancement of his sentence he has a right to show cause against his conviction which right he can exercise whether he had on an earlier occasion an opportunity of doing so or not. The real test is not whether the accused has had an opportunity of showing cause against his conviction but whether a judgment of the High Court pronounced after a full hearing in the presence of both the parties after notice issued in that behalf has replaced the judgment of the lower Court. If the judgment of the lower Court is so replaced there is no occasion at all for the exercise of the revisional powers under section 439(1) of the Criminal Procedure Code. If however no such judgment has replaced that of the lower Court the High Court has got the power to issue a notice for enhancement of the sentence and the accused has, in spite of whatever has happened in the past, while showing cause against the notice of enhancement also the right to show cause against his conviction.

The right which is thus conferred upon the accused under section 439(6) cannot be taken away by having resort to the principle of finality of judgments incorporated in section 369 of the Criminal Procedure Code. As we have observed above that principle comes into operation when once a judgment of the High Court has replaced that of the lower Court and in those cases the High Court would not be competent to review or revise its own judgment. The High Court would would also not be then entitled to issue any notice for enhancement of sentence in the exercise of its revisional powers under section 439(1) of the Criminal Procedure Code. Where however the High Court in exercise of its revisional power over the judgments of the lower Courts under section 439(1) issues a notice for enhancement of sentence and gives an opportunity to the accused of being heard either personally or by pleader in his own defence under section 439(6) to him also to show cause against his conviction comes into existence and this right of his cannot be negatived by having resort to the provisions of either section 369 or section 430 of the Criminal Procedure Code. Section 369 in terms provides, "save as otherwise provided in this Code" and section 439(6) would be an otherwise provision which is saved by this non-obstante clause appearing in section 369. It is significant to note that both these amendments, the one in section 369 and the other in section 439 were enacted by section 119 of Act XVIII of 1923 and the very purpose of these simultaneous amendments would appear to be to effectuate the right given to the accused to show cause against his conviction as enacted in section 439(6) of the Criminal Procedure Code.

It may also be noted that the right which is thus conferred on the accused under section 439(6) is not an unlimited or unfettered right as observed by Mr. Justice Mahajan in Emperor v. Atta Mohammad ([1943] I.L.R. 25 Lah. 391 (F.B.)). In the case of trials by jury where an accused person has been convicted on the verdict of a jury and is called upon under section 439(2) of the Criminal Procedure Code to show cause why his sentence should not be enhanced he is entitled under section 439(6) to show cause against his conviction, but only so far as section 423(2) of the Code allows and has not an unlimited right of impugning the conviction on the evidence. It has been held by the Allahabad High Court in Emperor v. Bhishwanath (I.L.R. 1937 Allahabad 308) that the combined effect of sections 439(6) and 423(2) is to entitle the accused to question the conviction by showing only that the Judge misdirected the jury or that the jury misunderstood the law laid down by the Judge in his charge.

A similar conclusion was reached by the majority of the Judges in The Superintendent and Remembrancer of Legal Affairs, Bengal v. Jnanendra Nath Ghose & Another (33 Calcutta W.N. 599), where it was held that a person who had been convicted on his own plea of "guilty" under section 271(2) of the Criminal Procedure Code, in showing cause against a notice for enhancement of sentence, could only while showing cause against his conviction attack the propriety or legality of sentence but could not withdraw the plea of 'guilty' or go behind such a plea as a confession of the

facts charged.

There are no doubt two other judgments, one of the Bombay High Court in Emperor v. Ramchandra Shankarshet Uravane ([1932] 35 Bom. L.R. 174) and the other of the Rangoon High Court in Nga Ywa and another v. King-Emperor ([1934] I.L.R. 12 Rangoon 616) which appear to run counter to the ratio decidendi of these decisions of the Allahabad and the Calcutta High Courts respectively but we are not called upon to resolve that conflict, if any. Suffice it so say that the right which is conferred on the accused of showing cause against his conviction under section 439(6) of the Criminal Procedure Code is a right which accrues to him on a notice for enhancement of sentence being served upon him and he is entitled to exercise the same irrespective of what has happened in the past unless and until there is a judgment of the High Court already pronounced against his conviction after a full hearing in the presence of both the parties on notice being issued by the High Court in that behalf. This right of his is not curtailed by anything contained in the earlier provisions of the section 439 nor by anything contained in either section 369 or section 430 of the Criminal Procedure Code.

We are therefore of the opinion that the decision reached by the High Court of Bombay in the case under appeal was wrong and must be reversed. We accordingly allow the appeal and remand the matter back to the High Court of Judicature at Bombay with a direction that it shall allow the Appellant to show cause against his conviction and dispose of the same according to law.

</html