
(1933) 02 CAL CK 0052
In the Calcutta High Court

Emperor	Vs	APPELLANT
Manmatha Nath Kundu		RESPONDENT

Date of Decision : 09-02-1933

Acts Referred:

Citation : 143 Ind. Cas. 238

Hon'ble Judges : Patterson, J;Panckridge, J

Bench : Division Bench

Judgement

1. This Reference (No. 128 of 1932) is one of several references made by the learned Sessions Judge of Dinajpur.

2. It appears that one Babu Lokendra Mohan Sen was convicted by the Special Magistrate of Dinajpur under the provisions of Ordinance No. II of 1932. He was sentenced to undergo a term of rigorous imprisonment and also to pay a fine of Rs. 400 The Letter of Reference states that a petition was presented to the learned Sessions Judge by one Kshitindra Mohan Sen the brother of the convicted person. The petitioner brought the following facts to the notice of the Judge. It appears that in order to realise the fine the Magistrate issued what the learned Judge describes as distress warrants in respect of certain movable property which is stated to be the joint property of the petitioner and his brother, the convicted person. I have looked into the record of the Special Magistrate. It is evident that he was prepared to accept the petitioner's statement that the movable property was joint but held that was nevertheless entitled to have the property seized u/s 386, Sub-section (1), para of the Code of Criminal Procedure, and subsequently sold, the rights of the petitioner being limited to pre-emption or, it e was not disposed to exercise that right d one-half of the price realised at the same. In the opinion of the Sessions Judge he order for seizure and subsequent sale of he property in question is unjustified, and he draws our attention in his letter to he decision of this Court in Queen-Empress v. Sita Nath Mitra 20 C. 476 where it was held hat the liability of movables In which the delinquent had an undivided share could not be enforced by distress. In the

opinion of the learned Sections Judge, the substitution of the word "attachment" for the word ?attachment? for the word ?distress? in Section 386 by the amendment of 1923, has not affected the applicability of this decision. The learned Advocate-General who has appeared to oppose the reference has drawn our attention to various authorities of which Shivlingappa Nijappa Tubchi Vs. Gurlingava Basappa Tubchi, is one. He has also argued that even if the order is wrong, we have no jurisdiction to set it aside and that if there is any remedy open to the applicant, it is by way of a civil suit. He has also drawn our attention to the fact that no rules have been made by the Local Government under the powers conferred by Section 386, Sub-section (2) for the determination of the claims of third parties to property attached under Sub-section (1) para (a) of that section and that therefore no Machinery exists whereby the court ordering the attachment can investigate the justice of the claimant's assertion that he is interested in the property attached. In my opinion, in the circumstances of the present case, the last argument has but little importance because the Special Magistrate, has not questioned the Petitioners assertion that he is entitled to a half share in the property, but has dealt with the matter on the basis that he is so entitled We are not required to decide whether Section 386 Sub-section (1) para, (a) is totally inapplicable to the case of joint property. It may very well be that under that paragraph, an undivided share in joint movable property maybe attached and even, sold according to the procedure recognised by Civil Law. Speaking for myself I should be most reluctant to hold that the action of the Special Magistrate is covered or contemplated by the provisions of the, paragraph. In my opinion Queen-Empress v. Sita Nath Mitra 20 C. 476 already referred to, is to be preferred to the other decisions to which our attention has been directed, and I should find considerable difficulty in arriving at the conclusion that the language of the Criminal Procedure Code, as it now stands, entitles the court to order the seizure and sale of movable property in which the convicted person has only an undivided share, without the consent of those jointly interested with him. However, I have come to the conclusion that whatever view we hold as to the regularity of the order of the Special Magistrate, we should not interfere with it, because I consider that the Judge has no jurisdiction to refer the case to us u/s 438 of the Criminal Procedure Code. The date of the order of reference is June 17th, 1932, when the Ordinance II of 1932 was still in operation. Under that Ordinance there is in certain cases an appeal from conviction and sentence by a Special Magistrate to the Court of Session. I am, therefore, not prepared to say that the Court of Special Magistrate is not a Criminal Court inferior to the, Court of the Sessions Judge within the meaning of 8. 435 of the Criminal Procedure Code. Prima facie, therefore, the Sessions Judge would have power to call for and examine the record of any proceeding before the Special Magistrate and thereafter, if he saw fit, to report. The result of his examination for orders of the High Court u/s 438 Sub-section (1). The difficulty, however, arises from the provisions of Section 51 of the Ordinance II. The words of the section are as follows:

Notwithstanding the provisions of the code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided by this Ordinance, be no appeal from any order or sentence of a court constituted under this Ordinance and, save as aforesaid, no court shall have authority to revise such order or sentence, or to transfer any case from any such court, or to make any order under s 491 of the Code, or have any jurisdiction of any kind in respect of any proceeding of any such court.

3. The phraseology of the section is clearly very wide, and in my opinion that part of it which deprives other courts of any jurisdiction of any kind in respect of any " proceedings of any court constituted under the Ordinance, save as therein provided, has the effect of depriving the Sessions Judge of the right of calling for and examining the period u/s 435 and of referring the case for orders of the High Court u/s 438, Sub-section (1). The reference therefore, appears to us to be made without jurisdiction. It may be, had the petitioner seemed fit to move this Court within the period prescribed by practice from the date of the order of which he complains, we should have been ready to consider whether the case was one in which we should be justified in exercising our power of superintendence u/s 107 of the Government of India Act. This, however, need not be considered, as the order complained of was passed nearly a year ago. In these circumstances we think that we are compelled to reject the reference.

4. We pass similar orders in the remaining references where the facts are the same.