
(1932) 04 BOM CK 0009
In the Bombay High Court
Case No : Criminal Revision No. 56 of 1932
In Re: Pandurang Venkatesh Malgi

Date of Decision : 12-04-1932

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 386

Citation : AIR 1932 Bom 476 : (1932) 34 BOMLR 1102 : (1932) ILR (Bom) 364

Hon'ble Judges : Broomfield, J; Baker, J

Bench : Division Bench

Judgement

Broomfield, J.—The applicant, P.V. Malgi, is a typist-sectioner in the Subordinate Judge's Court at Gadag, His brother, S.V. Malgi, a pleader of Gadag, was convicted u/s 17(2) of the Criminal Law Amendment Act on February 1, 1932, and sentenced to pay a fine of Its. 300, A warrant was issued for recovery of the fine u/s 386 of the Criminal Procedure Code, and in execution of the warrant the police on February 3, 1932, attached a typewriter, a looking-glass, and Rs. 54 in cash as moveable property belonging to the said S.V. Malgi, On that same day the present applicant made an application to the Magistrate in which he claimed all these things as his property. As regards the typewriter, he stated in his application that he had himself purchased it in the year 1920 for the purposes of his work as a sectioner. But in certain affidavits which he subsequently produced it was stated that the typewriter had been purchased by some other person in that year, and presented as a gift to the applicant. The typewriter was attached, not from the applicant's house, but from the civil Court premises. As regards the sum of Rs. 54, the applicant alleged that it was the property of the United Karnatak Insurance Co. Ltd., Dharwar, of which the applicant is the agent, and that the sum represented the sum collected by the applicant in respect of certain premiums. As regards the looking glass, the applicant alleged that it was his personal property, and did not belong to his brother. On this application the Magistrate made the following order ;—

The property attached by the Police seems to belong to the undivided family of which the accused is a member though the same might have been purchased by the applicant in his name. There is no documentary evidence to show that the

cash is the property of the Karnatak Company. The application is, therefore, rejected.

This is the order against which the present application is brought. It is not a very satisfactory order. Although it appears to be a fact that the applicant and his brother are members of an undivided Hindu family, it is possible for members of an undivided Hindu family to own separate property. The Magistrate says that there is no documentary evidence to show that the cash the property of the Karnatak Company. He had not hold an inquiry, and it does not appear therefore that the applicant had any opportunity of producing documentary evidence. It is obvious that if the cash really is an amount collected by the applicant as agent of the Karnatak Company, it is neither his property, nor the property of his brother, but the property of the company, and not therefore liable to be attached. Nevertheless the present application for revision of the Magistrate's order raises a legal point of some difficulty, because Section 386 of the Criminal Procedure Code contains no provision for an inquiry by the Magistrate as to claims by third parties, and there is no such provision to be found anywhere else in the Code except in Section 88(6A), and that applies only in a case where there has been a proclamation issued and not in an ordinary case where property has been attached under a warrant for recovery of fine. The point has come before the Courts on several previous occasions, In *Queen-Empress v. Gasper* ILR (1894) Cal. 935 it was held that a Magistrate who has issued a distress warrant u/s 386 of the Criminal Procedure Code is not required by law to try any claim which may be preferred to the ownership of the property distrained. In *Queen-Empress v. Kandappa Goundan* ILR (1896) Mad. 88 the actual decision was that when a claim is made to property attached u/s 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right, and if the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition. But in the judgment the learned Judges observed that what might be said with regard to Section 88 would equally apply to Section 886. These cases were followed by our High Court in an unreported case, *Queen-Empress v. Chhagan Jagannath* (1898) Cr. C. 976 The judgment there is a very short one, and I may quote it in full:

No provision having been made in the Code of Criminal Procedure for inquiring into title by the Criminal Courts it appears to us that the same practice should be followed here as is laid down in the decisions of the High Courts of Calcutta and Madras ; see *Queen-Empress v. Gasper* (1894) I.L. It. 22 Cal. 935 and *Queen-Empress v. Kandappa, Goundan*, ILR (1896) Mad. 88. We accordingly direct that the sale of the property attached be stayed by the Joint Sessions Judge for such time as in his opinion will be sufficient to give the claimant time to establish her right thereto, unless of course by reason of the nature of the property an immediate sale would be for the benefit of the owners in which case the proceeds should be held over.

2. The learned Government Pleader who appears to oppose this application has

referred us to several other cases in which it has been held that the only remedy of an aggrieved third party in such cases is by civil suit. All these decisions are based on the absence of any provision in the Criminal Procedure Code for an inquiry by the Magistrate into claims by third parties, and owing to the absence of such provision it has been held that the criminal Courts have no jurisdiction to make such an inquiry. It seems pertinent to point out that under the terms of Section 386 the Magistrate has no jurisdiction to attach any property except property belonging to the offender, and, speaking for myself, I have felt some difficulty in understanding why the absence of a specific provision in the Code should prevent the Magistrate from making an inquiry as to the facts on which his jurisdiction to make an order depends. The legislature presumably did not intend that the provisions of this section should be used in an oppressive manner, and to force a party to bring a civil suit in circumstances such as appear to exist in the present case is, on the face of it, a hardship. In the amending Act of 1923 a new provision was inserted in Section 386, that is Sub-section (2), providing that the Local Government may make rules regulating the manner in which warrants under Sub-section (1), Clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant. It was, therefore, in the contemplation of the legislature that claims by third parties to property attached u/s 386 should be summarily determined by the criminal Courts, and it would seem to be desirable that rules should be made by the Local Government to obviate unnecessary litigation and possible hardship. So far, however, it appears that no rules under this Sub-section have been made, and that being so, it seems that we have no option but to follow the law as laid down in the authorities. The most we can do is to make the same order that was made by the Court in *Queen-Empress v. Ghagagan Jagannath* (1898) Cr. C. 976. The circumstances of the present case appear to us to justify an order staying the sale of the property, and we accordingly direct that the sale of the property attached be stayed by the Magistrate for such time as in his opinion will be sufficient to give the claimant time to establish his right thereto in a civil Court.

Baker, J.

3. I agree. The difficulty arises because although under the new Section 386, Sub-section (2), power has been given to the Local Government to make rules regulating the manner in which warrants under Sub-section (1), Clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant, no such rules have in fact been made, and the Magistrate, therefore, has no power to determine such claims. It may seem anomalous that the only remedy should be by way of a civil suit, but as the law now stands, that seems to be the case. I agree in the order proposed.