CRIMINAL REFERENCE.

Before Ghose J.

EMPEROR

v.

BANDE ALI SHAIKH.*

1939

June 9.

Attachment—*Removal of attached crop, if amounts to theft—Land in joint possession, if can be subject to attachment—Code of Criminal Procedure (Act V of 1898), s. 145—Indian Penal Code (Act XLV of 1860), ss. 188, 379.*

The removal of crops standing on land attached and taken possession of by the Court under s. 145 of the Code of Criminal Procedure amounts to theft under s. 379 of the Indian Penal Code.

Queen-Empress v. *Obayya* (1) distinguished.

When there is a dispute likely to cause a breach of the peace concerning any land, a Magistrate is empowered to institute a proceeding under s. 145 (*1*) of the Code of Criminal Procedure and also can attach the land under sub-s. (*4*) of that section pending his decision, although the land is claimed by one party to be in joint possession of both the parties.

CRIMINAL REVISION.

This was a Reference and a Rule against the convictions and sentences of several persons under ss. 188 and 379 of the Indian Penal Code. In this case, on a police report that there was an apprehension of the breach of peace on account of a dispute with regard to a piece of land with standing crops, the Subdivisional Magistrate of Kushtia instituted a proceeding under s. 145 of the Code of Criminal Procedure on July 8, 1938. In the proceeding the land was described by its *touzi* number mentioning "two annas "six pies portion" within brackets. This portion, however, had been separated much earlier than the proceeding. On the same day, the Magistrate also

*Criminal Reference, No. 75 of 1939, made by B. M. Mitra, Sessions Judge of Nadia, dated May 11, 1939, and Criminal Revision, No. 526 of 1939, against the order of B. M. Mitra, Sessions Judge of Nadia, dated May 9, 1939, confirming the order of A. Karim, Magistrate, First Class, of Kushtia, dated Feb. 27, 1939.

(1) (1898) I. L. R. 22 Mad. 151.

ordered that the land in dispute would remain attached till his final decision. A police party was sent to attach it and a constable was put on guard to protect the standing crops. Between July 16 and 30, 1938, several persons including some members, who were made parties to the proceeding and on whom the notice had been personally served, entered upon the land and reaped the standing crops in spite of protest by the constable. The notice, however, had not been posted at or near the land, although published generally by beat of drum. On August 15, the learned Subdivisional Magistrate lodged a complaint under ss. 188 and 379 of the Indian Penal Code against those persons. The contentions of the defence were that the proceeding, being with regard to a share of a *touzi* in *ejmâli* possession, the proceeding was without jurisdiction, that no copy having been posted at or near the land the order had not been properly promulgated and the subsequent proceeding was bad, and, in any case, the accused could not be legally convicted of theft. Four of the accused persons took a further plea that, not being parties to the proceeding under s. 145 of the Code of Criminal Procedure, they could not be convicted under either section. The trial Court convicted eleven accused persons under ss. 188 and 379 of the Indian Penal Code. On appeal the learned Sessions Judge of Nadia upheld the convictions of seven of the accused persons and, under s. 438 of the Code of Criminal Procedure, referred to the High Court the case of four accused persons who were not parties to the proceeding under s. 145 recommending their acquittal. Thereafter, the other seven accused persons whose appeal had been dismissed, obtained a Rule from the High Court. The Reference and the Rule were heard together.

Santosh Kumar Basu and *Jyotish Chandra Pal* for the accused. The proceeding under s. 145 was without jurisdiction. It related to property in the joint possession of both parties and with regard to an undefined share of it and no Court had jurisdiction to institute such proceeding in those circumstances.

Makhan Lal Roy v. *Barada Kanta Roy* (1). If there was any apprehension of breach of the peace, the Magistrate might have utilised s. 107 of the Code of Criminal Procedure, but not s. 145. Secondly, the accused could not be convicted under s. 379 of the Indian Penal Code. Attachment by Court does not do away with the possession of the legal owner and if the latter removes the crop he may be guilty under s. 424 of the Indian Penal Code, but not under s. 379. *Queen-Empress* v. *Obayya* (2). In any case the persons who were not parties to the original proceeding under s. 145 should be acquitted.

Anil Chandra Ray Chaudhuri for the Crown. The proceeding under s. 145 was with regard to land which was neither unspecified nor in joint possession. According to the findings of the Courts below, the real dispute was with regard to the standing crops which had been grown by one of the parties. The share of the *touzi* had been mentioned to specify only the portion of the estate which had been separated long ago. The Courts found that the accused had no possession of the land and had not grown the crops. Moreover, the order of attachment was an *interim* order under sub-s. (4) of s. 145 of the Code of Criminal Procedure, before the Court entered into any question of possession at all. Therefore, there was no question of want of jurisdiction. With regard to the second question, the case of *Queen-Empress* v. *Obayya* (2) is not only distinguishable but the test laid down there shows the incorrectness of the contention raised by the other side. It draws a distinction between an attachment by the civil Court where possession is left with the owner and an attachment where the Court takes actual possession of the property. It approves of the decisions of the same Court in *Queen-Empress* v. *Periyannan* (3) and *Queen-Empress* v. *Dadala Atchigadu* (4), the principles of which apply directly

(1) (1906) 11 C. W. N. 512.
(2) (1898) I. L. R. 22 Mad. 151.
(3) (1883) Weir C. R. (4th Ed.) 423.
(4) (1881) Weir C. R. (4th Ed.) 420.

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to the present case. In the present case, the attachment was effected by the method laid down in s. 88 (4) (e) of the Code of Criminal Procedure by taking actual possession of the property and by posting a constable to guard the crops. The removal in such circumstances even by an owner, although the accused are not so, would be theft within the meaning of s. 379 of the Indian Penal Code.

GHOSE J. Eleven persons were convicted under ss. 379 and 188 of the Indian Penal Code and each of them sentenced to pay a fine of Rs. 40, in default to undergo rigorous imprisonment for seven weeks. These persons then petitioned the Sessions Judge against conviction. The learned Judge rejected the petition except with regard to four of the petitioners, namely, Bande Ali Shaikh, Deraj Tulla Shaikh, Asim Uddin Shaikh and Ajer Shaikh. As regards them, the learned Judge has made a Reference recommending that they should be acquitted of the charges in respect of which they have been convicted on the ground that they were not parties to the proceedings under s. 145 of the Code of Criminal Procedure out of which the prosecution arose. For the reasons stated by the learned Judge, I accept the Reference and direct that these persons be acquitted of the charges under ss. 379 and 188 of the Indian Penal Code. The fines, if paid, should be refunded.

As regards the remaining seven petitioners, the question is whether the convictions and sentences passed thereunder should be maintained. It appears that on account of a dispute regarding paddy growing on a plot of land, the Subdivisional Magistrate of Kushtia instituted proceedings under s. 145 of the Code of Criminal Procedure and attached the land in dispute describing it by its *touzi* number and mentioning "two annas six pies portion". This, however, causes no difficulty, because it is admitted that this is a separate portion and there is no dispute as to the identity of the land attached. Subsequently,

it is said, the accused party entered upon the land and reaped and took away the standing crops therefrom and thereby disobeyed the order of attachment. In these circumstances they have been convicted as mentioned above.

It is contended first that the proceedings under s. 145 of the Code of Criminal Procedure were not validly instituted because the land is in the joint possession of the parties. As a matter of fact it was not found that the land was in the joint possession of the parties, but the question is immaterial, having regard to the stage at which the order of attachment was issued. There was a dispute likely to cause a breach of the peace concerning the land and, therefore, the first condition of instituting a proceeding as under sub-s. (*1*) of s. 145 of the Code of Criminal Procedure was fulfilled. Thereafter under sub-s. (*4*) the Magistrate was to enquire as to possession and it is under the second proviso to that sub-section—the Magistrate having considered that it was a case of emergency—that he was empowered to attach the subject-matter of dispute pending his decision under that section. This is what was done in this case and therefore the objection that is now raised is of no avail.

The next contention is that the petitioners could not properly be convicted under s. 379 of the Indian Penal Code though they might be convicted under s. 424. This is on the authority of the case of *Queen-Empress* v. *Obayya* (1). That, however, was a case of attachment by the civil Court and it was pointed out that the possession remained with the owner, only he was forbidden to alienate or charge the crops. It was also pointed out that where that was not the case theft could be committed by the owner of crops under attachment removing them. In the present case, as pointed out by the learned Judge, the attachment was under s. 88 of the Code of Criminal Procedure and actual possession was taken which was

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evidenced by the fact that there was a constable posted at the spot and while he was there the crops were taken away. The argument that standing crops were not attached but only the land was attached is of no avail as the dispute was about the standing crops and land must be taken here to include the crops.

It seems to me, therefore, that the conviction of the seven petitioners is correct. The Rule is therefore discharged.

Reference accepted. Rule discharged.

A. C. R. C.