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M KISHEN v. SEDHU.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The judgment of the Court was delivered by

OLDFIELD, J.—The Judge has disallowed the application for execution on the ground, though not taken by the judgment-debtor, that the execution of the decree is barred under the provisions of s. 230, Act X of 1877, as due diligence was not used to procure complete satisfaction of the decree on the last preceding application. But the last preceding application to which s. 230 refers is an application made under that section, and in the case before us the last preceding application was made in July, 1877, before Act X of 1877 came into force. Those proceedings in execution were ultimately disposed of in December, 1877, but there was no fresh application for execution of the decree made intermediately between July and December, 1877. We reverse the order of the Judge and decree the appeal, and allow execution of the decree to proceed. The appellant will have costs in all Courts.

Appeal allowed.

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April 21.

CRIMINAL JURISDICTION.

Before Mr. Justice Sprinkie.

EMPRESS OF INDIA *v.* NILAMBAR BABU.

Act X of 1872 (*Criminal Procedure Code*), *ss.* 4, 297, 415, 416, 417, 418, 419, 420—*Stolen Property—High Court, Powers of Revision—"Judicial Proceeding."*

Where a person was accused of dishonestly receiving stolen property knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen, *held* that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418 of Act X of 1872 regarding its disposal (1).

Where there is a Court of Appeal, resort should be had thereto before application is made to the High Court for the exercise of its powers of revision.

Quære.—Whether the issue by the Magistrate of a proclamation under s. 416 of Act X of 1872 is a "judicial proceeding," within the meaning of s. 297 of that Act.

(1) If the Court is of opinion that no offence appears to have been committed regarding the property, it is bound to restore the property to the accused person.—*In re* Annapurnabai, I. L. R., Bom. 630.

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EMPRESS INDIA v. NILAMB BABU.

THIS was an application to the High Court for the exercise of its powers of revision under Act X of 1872. The petitioner and one Khazan Singh were accused, under s. 411 of the Indian Penal Code, of dishonestly receiving stolen commissariat tea, knowing that the same was stolen property. There being no evidence that the tea was stolen commissariat property, the Magistrate, Mr. E. White, discharged the accused persons on the ground that no offence had been proved against them, and ordered that a proclamation under the provisions of s. 416 of Act X of 1872 should issue. The petitioner applied for the revision of the Magistrate's order.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown, contended that a proceeding under s. 416 of Act X of 1872 was not a "judicial proceeding," and the High Court could not therefore interfere under s. 297.

Mr. *Colvin*.—The Magistrate must be taken to have acted under s. 418 of Act X of 1872 and not s. 416. He could not have acted under s. 416, as the procedure laid down in ss. 415 and 416 applies to property seized by the police under suspicious circumstances, and not to property regarding which an offence appears to have been committed. Orders made under s. 418 are open to revision,—s. 419. No offence having been proved against the petitioner, no offence appeared to have been committed, within the meaning of s. 418, and the Magistrate's order is illegal. The property was not stolen property.

The *Junior Government Pleader*.—The Magistrate considered that the property was stolen property, which was sufficient to enable him to make an order under s. 418. There are good reasons for thinking that the property was stolen.

SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader that this Court cannot interfere under s. 297 of the Criminal Procedure Code, as the order complained of purports to have been made under s. 416 of the Code, which directs the course to be pursued where the ownership of property seized by the police, as alleged or suspected to have been stolen, is unknown, and therefore the order was not made in the course of a "judicial proceeding." Ordinarily a proclamation issued under s. 416 would be made in consequence of a seizure by any police officer

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of property alleged (i) or suspected (ii) to have been stolen, or found (iii) under circumstances which create suspicion of the commission of any offence. On receiving the police report the Magistrate is to make such order respecting the custody and production of such property as he thinks proper (s. 415). But when the owner of any such property is unknown the Magistrate may detain it, or the proceeds thereof, if sold, and in case of such detention shall issue a proclamation, the particulars of which are detailed in s. 416.

It may perhaps be doubted, if nothing more be done than the mere issue of a proclamation, whether the course adopted by the Magistrate would have amounted to a "judicial proceeding." At the same time "judicial proceeding" means any proceeding in the course of which evidence is, or *may be taken*, or in which any judgment, sentence, or final order is passed on recorded evidence. The action of the Magistrate in issuing the proclamation is to require any person who may have a claim to such property as may be sent in by the police under s. 415 to appear before him and establish his claim within six months. This is possibly a stage of a judicial proceeding, for at the expiration of the term provided by the proclamation, it is probable that a claimant might appear, and evidence would be recorded. But it is not necessary for me to determine the point in this case. For Nilambar Babu and Khazan Singh, the accused, were arrested and sent in to the Magistrate for trial under s. 411 of the Penal Code (the stolen property being alleged to belong to Government) after an investigation made by the police. This therefore was not a case in which, in dealing with the property seized by them, and finding that the owner was unknown the Magistrate had issued a proclamation under s. 416 of the Criminal Procedure Code.

The proceeding that followed was a judicial proceeding in which evidence was recorded, after which the Magistrate felt himself bound to discharge the accused, as there was nothing to establish the fact that any tea had ever been stolen or missed from the commissariat godowns, and no claim on account of the tea had been made by the Commissariat Department. On the contrary, the Commissariat officials, Lieutenant Spence, Sub-Assistant Commissary General, Sergeant Griffiths, his subordinate, and Lieutenant Davies, Quarter-Master, 22nd Regiment, Sergeant Harris, Quarter

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Master Sergeant, all concurred in saying that not only no tea had been stolen, but that under the circumstances it was impossible that it should have been stolen. The Magistrate states that special inquiry had been made by the police in order to ascertain how Nilambar Babu, the victualling *gomashta*, could have become possessed of the tea, which was proved to be ration tea, but nothing further had been elicited, the police reporting that the Commissariat officials would not disclose the real facts of the case.

"It must, however," remarks the Magistrate, "be admitted that the case against the two accused is of the very gravest suspicion: a sack of tea precisely resembling ration tea is carried off in a closed *ekka* (*i.e.*, with the curtains down) from the neighbourhood of the Commissariat godown, and no explanation appears as to whence this tea came: further, five similar sacks of tea are found in the possession of the victualling *gomashta*, regarding which he can give no explanation whatever, and which (tea) precisely resembled ration tea, which it is his duty to serve out for the troops. Under the circumstances there may possibly be some justification for the assertion of the police that the Commissariat officials, had they chosen to exert themselves, might have discovered how the *gomashta* could have abstracted the Government tea: perhaps even now a thorough investigation into the Commissariat management here by the Heads of the Department might disclose the manner in which the peculation could have been carried on."

The Magistrate then discharged the accused, subject to their apprehension hereafter on the discovery of fresh evidence, and on the same day by a separate proceeding, or what is called "a foot-note in the case of Nilambar Babu," ordered that a copy of his judgment should be sent to the Commissary General for information, together with a complete list of the military stores found in possession of the *gomashta*, and further that "a proclamation under s. 416, Criminal Procedure Code, will issue regarding these articles." Nilambar Babu applies for a revision of this order under ss. 294, 297, and 419, Criminal Procedure Code, on the ground (i) that there was no evidence on record to show that the property was stolen property; (ii) that there was none that would justify action under s. 416 of the Code of Criminal Procedure; (iii) that the remarks made regarding the petitioner are not borne out

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by the evidence on record, and should be set aside; and (iv) that the property may be released in favour of the petitioner.

Under s. 418 the Magistrate was at liberty, at the close of the inquiry into the police charge under s. 411, Penal Code, to make such order as appeared right for the disposal of the property produced before him, and regarding which any offence appeared to have been committed. It is contended that the Magistrate's finding shows that no offence appears to have been committed. But I do not understand the Magistrate to mean that no offence had been committed. I understand that he reluctantly felt himself compelled to discharge the accused for want of further evidence. The petitioner was aware, it would seem, that the Magistrate's order was made really under s. 418, for he cites s 419 of the Criminal Procedure Code as one under which this Court could deal with it, and this is so. But there was a Court of Appeal to which he should have first resorted, *viz*, that of the Sessions Judge, who might have interfered in the matter (1) Resort to this Court as one of Revision was premature, and it has been the practice, I think, of this Court not to interfere in revision, when the petitioner has neglected to avail himself of the ordinary channel of relief below. But as this application has already been admitted by a Judge of this Court, and as the section (419) admits of my interference, it would be better perhaps and more convenient for all to dispose of the case here. My reasons for assuming that the order of the Magistrate was passed under s. 418 is that it was made at the conclusion of the inquiry in his Court into the alleged offence under s. 411 of the Penal Code, and a proclamation under s. 416 was issued, because s. 420 provides that an order passed under ss. 418 and 419 may be in the form of a reference of the property to the Magistrate of the District or to a Magistrate of a Division of a District, who shall in such cases deal with it as "*if the property had been seized by the Police and the seizure had been reported to him in the manner hereinbefore mentioned*". It was not necessary in this case that Mr. White, the Magistrate, should make the order in the form referred to, as he was already competent to issue the proclamation referred to in s. 416. So far then it appears that

(1) The words "Court of Appeal" in s. 419 are not necessarily limited to a Court before which an appeal is at the moment pending—*Empress* v. *Jogyessur Mochi*, I. L. R., 3 Calc. 379.

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the order was one within the competence of the Magistrate to make, and that the Magistrate believed that an offence had been committed, though it was not on the evidence before him established against the accused. Whether action under s. 416 was justified by the evidence was for the Magistrate to determine. I cannot say that he exercised his discretion wrongly regarding the tea regarding which the Babu made no claim. On the contrary, the latter said that the tea was found in the house occupied by Khazan Singh, his servant, and he supposes that Khazan Singh put it there. Moreover he did not explain how he became possessed of the tea or sugar either, but he said that they were not ration food. He, however, explained his possession of other portions of the property found. There was moreover some evidence that the guns were his, as also the "kukri" and pistol, and the cartridges did not appear to bear the Queen's mark. The other articles, too, were such as he could have bought at public auction or might reasonably have in his own possession. This, too, may be said of the sugar which did not exceed 1½ sirs in quantity. The law requires that "an offence should appear to have been committed," and when this is the case, an order may be made under s. 418 of the Criminal Procedure Code. But with respect to the property proclaimed an offence appears to have been committed only as regards the tea. Therefore the proclamation must be confined to the tea found and seized by the police, and in this respect the order must be modified, and the remaining portion of the property will be excluded from the proclamation. I see no remarks on the part of the Magistrate regarding the Babu which are not warranted by the suspicious character and the circumstances of the case, and the Court below was quite justified in refusing to give back the tea, but the petitioner may have the rest of the property restored to him.

APPELLATE CIVIL.

1879
April 22

Before Mr. Justice Pearson and Mr. Justice Spankie.

SOHAN LAL AND ANOTHER (DECREE-HOLDERS) *v.* KARIM BAKHSH (JUDGMENT-DEBTOR).*

Execution of Decree—Act X of 1877 *(Civil Procedure Code), s.* 230*—Limitation.*

The concluding clause of s. 230 of Act X of 1877 refers to the question of limitation, not that of due diligence.

* Second Appeal, No. 114 of 1878, from an order of W. C. Turner, Esq., Judge of Saháranpur, dated the 24th July, 1878, affirming an order of Babu Ishri Prasad, Munsif of Deoband, dated the 6th March, 1878.