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tion to that effect was certainly wrong and not warranted by the language of order XXI, rule 86. This case must be deemed to have been overruled by implication of a Division Bench ruling of this Court in *Lala Lachman Narain* v. *Chattar Singh* (1), in which it was clearly held that the discretion was confined to the forfeiture and not to the re-sale of the property.

We accordingly allow this appeal and setting aside the sale of the 9th October, 1930, direct that proceedings be taken for re-sale. The appellants will have the costs from the auction purchaser, Buttu Mal, in both courts.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

1934
October, 25

EMPEROR *v.* BENI*

Civil Procedure Code, order XXI, rules 24, 44—Attachment of crops—Copies of warrant of attachment not signed or sealed by court—Attachment illegal—Removal of crops not theft—Indian Penal Code, section 379—Accused alleging purchase of crops before the attachment—Question of title should be investigated.

Certain crops were attached in execution of a decree and entrusted to a custodian. Subsequently, they were removed by a person, with the consent of the judgment-debtor, and in spite of the remonstrances of the custodian. At a trial of this person for theft it appeared that the copies of the warrant of attachment, which were affixed on the land on which the crops stood and on the door of the judgment-debtor's house, were not signed by the Judge and were not sealed with the seal of the court. *Held*, that the formalities prescribed by order XXI, rules 24 and 44, of the Civil Procedure Code not having been complied with, the attachment was illegal and, therefore, the property did not pass from the possession of the judgment-debtor into the possession of the court, and its removal with the consent of the judgment-debtor was not theft.

Held, further, that an allegation made by the accused that he had purchased the crops some time before their attachment

*Criminal Revision No. 198 of 1934, from an order of Vishnu Ram Mehta, Additional Sessions Judge of Pilibhit, dated the 5th of January, 1934.

(1) E.S.A. No. 1393 of 1928, decided on 18th April, 1929.

should have been investigated by the trial court before it could convict him; for if a person in assertion of a *bona fide* title accruing before the attachment removes the crops he cannot be said to be acting dishonestly or fraudulently.

Mr. *G. S. Pathak*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

BAJPAI, J.:—This case was heard by me on the 6th of August, 1934, when I directed that the amin of the civil court should be examined and his evidence tested carefully by the execution record of case No. 67 of 1933 of the court of Judge, small causes, at Pilibhit. The amin was examined and cross-examined and his evidence has been certified to this Court along with a note by the Judge.

The facts of the case might be stated briefly once more. On the 24th of March, 1933, the amin of the civil court went to attach certain crops belonging to Bhaggi in execution of a decree obtained by Jagmohan Lal. It is said that the crops were attached and entrusted to a custodian. Some days afterwards, that is, on the 2nd of April, 1933, Beni the applicant before me removed the crops in spite of a remonstrance by the *supurdar*. Upon these facts Beni was convicted of an offence under section 379 of the Indian Penal Code and sentenced to pay a fine of Rs.50.

The contention of the applicant before me as well as before the courts below was that the attachment was illegal and consequently there could be no theft if the applicant removed the crops. Reliance was placed on the case of *Ram Sakal Singh* v. *Emperor* (1), in which NIAMAT-ULLAH, J., held that where attachment of movable crops is made merely by beat of drum and the procedure prescribed by order XXI, rule 44 of the Civil Procedure Code is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into the possession of the court, and if

(1) A.I.R., 1931 All., 142.

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therefore the crops are removed with the consent of the judgment-debtor the person removing the crops cannot be said to be guilty of theft. The argument of the applicant is that the procedure prescribed by order XXI, rule 44 was not followed in the present case. As there was some controversy on this point when the case was heard by me on the last occasion and as the evidence of the amin was not full, I considered it desirable to have the amin examined afresh. He now says that he received one warrant of attachment from the court and he prepared two copies of the warrant himself and affixed one such copy on the land where the crop was grown and another copy on the outer door of the residential house of the judgment-debtor. He admits that the copies of the warrant of attachment were not sent to him by the court but that he himself prepared the copies of the warrants. The learned Judge before whom the amin was examined has appended a note, from which it would appear that he felt some difficulty in accepting the evidence of the amin. I have similar difficulty myself, but even if it be assumed that the amin is speaking the truth, I agree with the applicant's counsel that the formalities prescribed by order XXI, rule 44 have not been complied with. There was no warrant for the preparation of the copies by the amin. Under order XXI, rule 24 every process issued by a court for the execution of the decree shall bear date the day on which it is issued and shall be signed by the Judge or such officer as the court may appoint in this behalf and shall be sealed with the seal of the court and delivered to the proper officer to be executed. The copies that were prepared by the amin might have borne date the day on which it was issued but they were not signed by the Judge and they were not sealed with the seal of the court. The amin's evidence makes this clear. He says that the warrants were not sent to him by the court and that he himself prepared the copies of the warrants. It is, therefore, obvious that the copies were signed by the

amin and did not bear the seal of the court. As pointed out by me in my former order, their Lordships of the Privy Council in *Muthiah Chetti* v. *Palaniappa Chetti* (1) have said that "No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done." The Code prescribes under order XXI, rule 24 for the processes to be signed by the Judge or such officer as the court may appoint in this behalf and for the processes to be sealed with the seal of the court. It is doubtful if the amin can be deemed to be an officer appointed by the court in this behalf and had the power to sign the process. In *Ram Dayal* v. *Mahtab Singh* (2) their Lordships of the Privy Council intimated that the judgment of the Allahabad High Court was correct. In that case OLDFIELD, J., had observed that "The fact that the order of attachment and notices of sale were not issued under the signature of the Judge, but of the munsarim, as though emanating from him, constituted serious illegalities of procedure; orders so issued could, properly speaking, have no legal effect, since section 222 of Act VIII of 1859 requires that the warrants for execution shall be signed by the Judge, and the munsarim had no power to sign them, having regard to his duties as declared in section 24 of Act III of 1873 (Civil Courts Act)." STRAIGHT, J., concurred with this view and held that the language of section 222 of Act VIII of 1859 was plain and positive and it was impossible to hold that the order directing attachment was not a warrant within the meaning of that section. It is true that their Lordships were discussing the illegality contained in the warrant of attachment and the notices of sale issued by the court itself and not the illegality in the warrants that had to be attached on the land and on the residential house, but that to my mind makes no

(1) (1928) I.L.R., 51 Mad., 343 (356). (2) (1884) I.L.R., 7 All., 506.

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difference, because all these warrants are processes that have to be issued by the court. Section 222 of Act VIII of 1859 is the same as order XXI, rule 44 in several material particulars. In *Khidir Bux* v. *Emperor* (1) their Lordships of the Patna High Court held that the injunction contained in order XXI, rule 24 about the sealing of the warrant with the seal of the court was mandatory and unless it was complied with, the attachment was illegal. It was also held that the attachment being illegal, resistance to such attachment could not constitute an offence. In *Badri Gope* v. *King-Emperor* (2) it was held that if the writ of attachment did not bear the seal of the court as required by order XXI, rule 24 the defect was not a mere technical one, because the presence of the seal of the court giving authority to the writ is an obviously imperative safeguard and if the writ was invalid and resistance was made at the time of the attachment the person resisting would be free from liability as long as no excessive force was used. I have, therefore, come to the conclusion that the attachment was illegal and that, therefore, the property did not pass from the possession of the judgment-debtor into the possession of the court, and it is not the case for the prosecution that the removal of the crops was without the consent of the judgment-debtor.

Indeed in this connection I have to notice another argument advanced by learned counsel for the applicant. It is said that the applicant had purchased the crops on the 23rd of February, 1933, by means of a sale deed about a month before the alleged attachment on the 24th of March, 1933. Whether the sale deed was merely a paper transaction or a valid transfer of title is a different question, but there can be no doubt that the judgment-debtor was a consenting party to the removal of the crops by the applicant. In this connection, however, the contention of the applicant is that the courts below have not gone into the question of title which they had

(1) (1918) 49 Indian Cases, 171. (2) (1925) I.L.R., 5 Pat., 216.

to decide, and reliance is placed on the case of *Emperor* v *Ghasi* (1). SEN, J., while construing section 424 of the Indian Penal Code observed that the crucial question was whether the alleged removal of property was dishonest or fraudulent, and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or not has to be determined by the criminal court before deciding upon conviction. The same crucial question for determination arises under section 379 of the Indian Penal Code as well. There can be no doubt that the courts below have not decided on the question of the validity of the sale deed produced by the applicant but have contented themselves by saying that the applicant knew of the attachment when he removed the crops and he should have desisted from such removal the moment he came to know of the attachment and if he felt aggrieved he should have gone to the executing court to file objections there. The District Magistrate undoubtedly is somewhat suspicious about the sale deed but he too has not recorded any definite finding on the point inasmuch as he was of the opinion that the matter was not of any importance, because if the accused had really got these crops he should have filed objections in the civil court in the course of the execution proceedings and had no right to take the law into his own hands. This really misses the crucial point, which is that if a person in assertion of a *bona fide* title accruing before the attachment removes the crops he cannot be said to be acting dishonestly or fraudulently. If, therefore, I had not agreed with the first contention of the applicant I would have felt it necessary to ask for a definite finding on this question of title. As it is, I am of the opinion that the attachment was illegal and the accused cannot therefore be said to have committed any offence.

(1) (1929) I.L.R., 52 All., 214.

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For the reasons given above I allow this application, set aside the conviction and the sentence and direct that the fine, if paid, be refunded.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Ganga Nath

EMPEROR *v.* SIA RAM AND OTHERS*

1934
October, 26

Criminal Procedure Code, sections 263, 342, 364, 537—Summary trial—Summons case—Omission to examine the accused and record his statement—Defect curable where accused not prejudiced.

Section 342 of the Criminal Procedure Code, relating to the examination of the accused after the examination of the prosecution witnesses, applies to summons cases as well as to warrant cases; it also applies to summary trials. But the recording of the whole of the examination of the accused in the form of questions and answers, which section 364 prescribes for warrant cases and summons cases, is expressly dispensed with in the case of summary trials. The words "if any" in clause (*g*) of section 263 do not imply that it is optional to the Magistrate in a summary trial to examine the accused or not, but merely imply that where the accused has made a statement, particulars of his statement should be noted; but that is not the same thing as recording his examination in full. The mere fact, therefore, that no other statement of the accused, beyond the plea of not guilty, has been recorded by the Magistrate in a summary trial would not show that the accused was never questioned at all.

The defect of non-compliance with the provisions of section 342 is a mere irregularity and is cured by the provisions of section 537 of the Criminal Procedure Code unless the accused has been prejudiced thereby.

This case was referred to a Division Bench, with the following referring order:

COLLISTER, J.:—This is a reference by the Sessions Judge at Bulandshahr under section 438 of the Criminal Procedure Code. Certain persons were tried for an offence under sections 426 and 352 of the Indian Penal Code and were convicted on the 4th April, 1934; and on the same date they were tried and convicted of an offence under section 379 of the Indian

*Criminal Reference No. 622 of 1934.