

blood and spiritual relationship and a perusal of it leaves no room for a claim that there is any actual relationship at all between the deceased and the petitioners 2 and 3. The application for revocation is really based upon the same dispute as to title as the civil suit is. There is indeed a definite allegation that the deceased had no estate, and the substance of the application is that the properties which the testator purported to make over by will were properties which he held not in his personal but in his official capacity and which actually belonged to the math or the Thakur. In my mind it is clear that the decision under appeal is correct and that the petitioners had no *locus standi* to maintain the application for revocation of the probate.

I would accordingly dismiss the appeal with costs: hearing fee five gold mohurs.

FAZL ALI, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Macpherson and Dhavle, JJ.

GOPI MAHTO

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 103 and 165—search by Sub-Inspector of Police in presence of two "respectable" witnesses but not "inhabitants of the locality"—mere irregularity—search, resistance to, whether justified by law—section 165, violation of—preliminaries of search not complied with—absence of "due care and attention" on the part of the Sub-Inspector—Penal Code, 1860 (Act XLV of 1860), sections 52 and 99(1)—search resisted—Sub-Inspector pushed back—conviction under section 352, whether bad.

* Criminal Revision no. 10 of 1931, from an order of Rai Bahadur S. N. Mukharji, Additional Sessions Judge of Patna, dated the 3rd November, 1930, affirming an order of R. Jagmohan, Esq., i.c.s., Subdivisional Officer of Dinapore, dated the 26th September, 1930.

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Section 103. Code of Criminal Procedure, 1898, provides :

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" Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses....."

Where the Sub-Inspector of Police proposed to make a search in presence of two " respectable " witnesses who, however, were not " inhabitants of the locality ", and where, in view of the attitude of the men who had assembled on the scene, the Sub-Inspector did not consider it worthwhile to serve upon them or upon any other person of the locality a notice under section 103, asking them to witness the search, *held*, that the failure or inability of the Sub-Inspector in the circumstances to secure search witnesses from the locality was no more than irregularity and could not by itself entitle a person to resist the search, if the action of the Sub-Inspector otherwise came within the first paragraph of section 99, Penal Code, 1860.

Emperor v. Sit Nyein(1), followed.

Section 165, Code of Criminal Procedure, 1898, provides :

" (1) Where an officer in charge of a police-station, or a Police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police-station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station."

Where, therefore, the Sub-Inspector of Police proposed to make a search but none of the preliminaries indicated in section 165 was complied with and the Sessions Judge had not found that the failure of the Sub-Inspector in this regard occurred in spite of " due care and attention " and the evidence gave no ground for holding that there was anything to prevent him from complying with the requirements of the section, and the petitioner was convicted under section 352,

(1) (1910) 8 Ind. Cas. 988.

Penal Code, for having pushed the **Sub-Inspector** and his constable back in order to prevent the search being made.

Held, that the search was not strictly in accordance with law and the Sub-Inspector not having acted in good faith within the meaning of section 52, Penal Code, 1860, so as to bring him within the protection of the first paragraph of section 99, the petitioner was justified in pushing the Police Officers back in order to prevent the search and, therefore, that the conviction under section 352 was bad.

Gokal v. Emperor(1), distinguished.

Per Macpherson, J.—Failure on the part of a Sub-Inspector to comply with section 165(5) would afford no ground for a finding that the search was “without due care and attention.”

The facts of the case material to this report will appear from the judgment of Dhavle, J.

Yunus, for the petitioners.

Assistant Government Advocate, for the Crown.

DHAVLE, J.—The three petitioners were convicted by the Subdivisional Magistrate of an offence under section 353 of the Indian Penal Code and sentenced each to a fine of Rs. 100 with six months' rigorous imprisonment in default. The Magistrate also found two of the petitioners, Gopi and Mahabir, guilty of an offence under section 341 of the Indian Penal Code, but considered it unnecessary to pass a separate sentence under this section. On appeal the Additional Sessions Judge of Patna altered the conviction of the three petitioners under section 353 to one under section 352 but maintained the sentence. He also upheld the conviction of Gopi and Mahabir under section 341.

James, J., who admitted the revisional application, also directed a notice to issue on Gopi and Mahabir to shew cause why sentence should not be pronounced against them under section 341 as no

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sentence was imposed under this section by the trial court. In doing so he observed that any imposition of sentence that may be made by the High Court would amount to an enhancement and that a notice was, therefore, necessary.

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The facts are that the Sub-Inspector of police-station Maner was making an investigation into a case of theft of a bicycle, and during the investigation received information that the stolen bicycle was concealed in the house of the petitioner Avadh Kurmi of village Musepur or Musapur. He proceeded at once to the house of Avadh and demanded the bicycle, and on receiving a refusal from the three petitioners who were all there, asked two of his companions, Baldeo Misser (the man who had given the information) and Deosaran, to act as search witnesses and intimated to the petitioners that he would search the house. The petitioners told the Sub-Inspector not to enter the house and when he insisted upon entering it, they pushed him back along with a constable who was with him. The Sub-Inspector had previously to this posted his men round the house, and upon being pushed back he asked Jumai Gope, a chaukidar, to run to the thana for help. The petitioner Avadh then went inside, took a bicycle and went away with it by the door where Jumai had been posted. The Sub-Inspector and the constable ran to arrest Avadh but were prevented by Gopi and Mahabir from going in that direction.

The only point urged in support of the application in revision is that the search which the Sub-Inspector proposed to make was illegal, and that the petitioners were, therefore, entitled to resist it and committed no offence even under section 352 of the Indian Penal Code in pushing the Sub-Inspector and his constable back. The grounds on which it is contended that the search was illegal are the failure of the Sub-Inspector to call two respectable "inhabitants of the locality," under section 103 of the Code of Criminal Procedure, to witness the search, and

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his failure to comply with the requirements of section 165 of the Code of Criminal Procedure in the matter of recording in writing the grounds of his belief that anything necessary for the purposes of his investigation would be found in the house and that such thing could not in his opinion be otherwise obtained without undue delay, and specifying in such writing the thing for which the search was to be made, and also in the matter of sending a copy of such record forthwith to the nearest Magistrate empowered to take cognizance of the offence. The Sub-Inspector has explained that in view of the attitude of the men who had assembled on the scene, he did not consider it worthwhile to serve upon them or upon any other persons of the busti a notice under section 103, asking them to witness the search, but asked Baldeo and Deosaran to act as search witnesses. Baldeo and Deosaran are both men of Balua and had come with the Sub-Inspector to Musapur from that village. A reference to the survey map of the thana shews that Balua is at least four miles from Musapur and is separated from it by two or three villages. It is plain, therefore, that Baldeo and Deosaran cannot be said to be "inhabitants of the locality." The lower courts have held that having regard to the attitude of the local inhabitants, the Sub-Inspector "did the only thing which was possible in those circumstances" and that there was "sufficient compliance with the law as enacted in section 103 of the Code of Criminal Procedure." The Additional Sessions Judge has further observed that the gist of section 103 is that there must be respectable search witnesses; and this observation is supported by the opinion of Twomey, J., in *Emperor v. Sit Nyein*⁽¹⁾, that the stress is on the word "respectable" and not on the word "locality." The respectability of the men from Balua has not been challenged. In my opinion the failure or inability of the Sub-Inspector in the circumstances to secure search witnesses from the locality was no more than an

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irregularity and would not by itself have entitled the petitioners to resist the search if the Sub-Inspector's action had otherwise come within the first paragraph of section 99 of the Indian Penal Code. As to the failure of the Sub-Inspector to comply with the requirements of section 165 in the matter of making a record and sending a copy of it to the magistrate, the Additional Sessions Judge has held that the procedure of the Sub-Inspector not being strictly legal, the petitioners were not guilty of an offence under section 353, being an offence committed against a public servant as such, but that they were guilty under the general law, namely, on the facts proved, guilty of an offence under section 352, in that they pushed the Sub-Inspector otherwise than on grave and sudden provocation. The petitioners would certainly be guilty of this offence unless they were entitled in the circumstances to push the Sub-Inspector back in order to prevent him from searching Avadh's house. If the Sub-Inspector had proceeded strictly according to law, the petitioners would have had no right whatsoever to resist him. Now paragraph (1) of section 99 of the Indian Penal Code, to which I have already referred, leaves private persons without any right of private defence against any act of a public servant which may not be strictly justifiable by law, provided it does not reasonably cause the apprehension of death or grievous hurt, and is done, or attempted to be done, by the public servant acting in good faith under colour of his office. The proposed house search could not have reasonably caused any apprehension of death or grievous hurt, and it was a Sub-Inspector of police under colour of his office that proposed to make the search. The question then is whether the Sub-Inspector can be said to have acted in good faith on the occasion: if so, the petitioners were not entitled to resist him at all, but if otherwise, they were within their rights in keeping him out, and it is not alleged that they used more violence than was necessary to prevent him from conducting a

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search which was not strictly in accordance with the law. The learned Additional Sessions Judge has at one place in his judgment remarked that the Sub-Inspector was actuated by good faith; but I take the remark to mean no more than that the Sub-Inspector honestly believed the information that had reached him about the bicycle being concealed in Avadh's house. Such an honest belief was, however, not sufficient to bring the Sub-Inspector within the protection of the first paragraph of section 99; for having regard to section 52 of the Indian Penal Code, it was necessary for him, if he was to make the search "in good faith", to proceed with due care and attention. The search was to be made under section 165, a section which authorised him to do so

" after recording in writing the grounds of his belief and specifying in such writing.....the thing for which the search is to be made ",

and which required a copy of the record to be sent forthwith to the nearest Magistrate. The learned Additional Sessions Judge has found that none of these preliminaries to a legal search was complied with, and he has not found that the failure of the Sub-Inspector in this regard occurred in spite of "due care and attention". The evidence of the Sub-Inspector gives no ground for holding that there was anything to prevent him from complying with the requirements in question; indeed his case was that he had complied with them, but this was not accepted by the Additional Sessions Judge.

In the view that I have taken it is unnecessary to discuss *Lal Mea v. Emperor*⁽¹⁾ and *Emperor v. Param Sukh*⁽²⁾ which were cited on behalf of the petitioners. The Assistant Government Advocate has cited *Gokal v. Emperor*⁽³⁾ but that was a case where the constables who had arrested a woman on a defective warrant were clearly acting in good faith so that it was not

(1) (1925) 43 Cal. L. J. 184.

(2) (1925) 23 All. L. J. 1037.

(3) (1922) 71 Ind. Cas. 503.

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open to the woman's friends to assault them. In view of the Sub-Inspector's unexplained failure to comply with the requirements of section 165 as found by the learned Sessions Judge, and especially of the failure to comply with the requirements of clause (1) of that section, I find it difficult to hold that he was acting in good faith, within the meaning of section 52 of the Indian Penal Code, and the petitioners were, it seems to me, justified in pushing him and his constable back in order to prevent a search which was not strictly in accordance with the law. I would, therefore, reverse the conviction and with it the sentence passed on the petitioners under section 352 of the Indian Penal Code.

As a matter of fact the charge that led to this conviction was in these terms :

" That you on or about the 12th day of April, 1930, at Musapur, police-station Maner, used criminal force to Sub-Inspector J. N. Misser and constable Suraj Singh with intent to prevent them from discharging their duty as public servants and thereby committed an offence punishable under section 353....."

This is really wide enough to cover the action of Gopi and Mahabir in preventing the Sub-Inspector and the constable from catching and arresting Avadh when he was going away with the bicycle. There is force, however, in the contention of the learned Counsel for the petitioners that the charge under section 353 was taken by all concerned to be confined to the act of pushing the Sub-Inspector and the constable and that the obstruction offered to them later on when Avadh was going away with the bicycle formed the subject of the charge under section 341 of the Indian Penal Code. The lower courts have found an offence under this section brought home to Gopi and Mahabir. In showing cause why sentence should not be pronounced against them under this section, learned Counsel has found it impossible on the facts found to challenge the conviction, but he has laid stress on the fact that the trying magistrate, who knew all the circumstances, considered a separate

sentence unnecessary. The offence was, however, not by any means venial. The Sub-Inspector of the thana was making an investigation into the theft of a bicycle and was acting under colour of his office in proposing to search the house for that article. It was fortunate for these petitioners and for their relative Avadh that the Sub-Inspector's procedure was marked by irregularities; they could have had no knowledge of this, but in their defence they were entitled to rely on it. When, however, it came to Avadh escaping with the bicycle and the Sub-Inspector and the constable going after him to arrest him—arrest him under section 54 of the Code of Criminal Procedure—Gopi and Mahabir acted lawlessly and without any technical excuse to be subsequently found for them. Gopi is the father and Mahabir some kind of uncle of Avadh, but their offence really comes under a much graver section, viz., section 353, though fortunately for them they were only charged under section 341 for this act, and they are naturally not prepared to face a retrial. Having regard to Gopi's age, however, I would sentence him under section 341 of the Indian Penal Code not to any substantive imprisonment but to a fine of Rs. 200, with one week's simple imprisonment in default; and I would sentence Mahabir under the same section to one month's simple imprisonment and a fine of Rs. 100 with one week's simple imprisonment in default.

Avadh who has been acquitted will be entitled to the refund of any part of the fine that he may have paid.

MACPHERSON, J.—I agree to the order proposed.

I am inclined to hold that the conviction under section 353 is good at least against Gopi and Mahabir because of their obstruction to the arrest of Avadh. But as it is true that the Courts below dealt vaguely with this part of the case it is not necessary to press the point, especially in view of the sentence proposed which is adequate punishment for these petitioners.

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On the question of law I prefer not to express a final opinion as to whether failure on the part of the Sub-Inspector to comply with section 165 (1) of the Code of Criminal Procedure would give room for a finding that the search was "without due care and attention." But I am satisfied that failure on his part to comply with section 165(5) would afford no ground for such a finding.

Order modified.

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Before Macpherson and Dharle, JJ.

BINDESHWARI NARAIN SINGH*.

v.

RAJA KIRTYANAND SINGH BAHADUR.

Code of Civil Procedure, 1908 (Act V of 1908), section 73 and Order XXI, rule 72(2)—court, whether has power to enforce an order for rateable distribution by summary process in execution—appeal, whether lies from an order refusing to execute an order for rateable distribution—amount bid by the decree-holder in an execution sale, whether forms "assets held by the court"—section 73—order for set-off in favour of decree-holder, whether is subject to the provisions for rateable distribution—Order XXI, rule 72(2).

A court has power to enforce an order for rateable distribution by summary process in execution.

The amount bid by a decree-holder at an execution sale forms "assets held by the court" within the meaning of section 73, Code of Civil Procedure, 1908, until the confirmation of the sale and an order for a set-off under Order XXI, rule 72(2), of the Code in favour of the decree-holder is subject to the provisions for rateable distribution contained in section 73.

* Appeal from Original Order no. 140 of 1929, from an order of Akhauri Nityanand Singh, Subordinate Judge of Monghyr, dated the 22nd March, 1929.