

now go back to the lower court for determination of the amount of mesne profits.

AGARWALA, J.—I agree.

Appeal allowed.

FULL BENCH.

Before Courtney Terrell, C.J., Fazl Ali and Agarwala, JJ.

RAJENDRA PRASAD MISSIR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), section 386(1)(a)—attachment of undivided share of offender in moveable property belonging to joint family, whether legal.

An undivided share of the offender in a moveable property belonging to the joint family of which the offender is one of the members cannot be attached under section 386(1)(a), Code of Criminal Procedure, 1898.

Queen Empress v. Sita Nath Mitra(1), followed.

The facts of the case material to this report are stated in the judgment of the court.

B. N. Mitter (with him *B. P. Jamuar*), for claimant in Criminal Revision 251 of 1932 :—The undivided share of the offender in a moveable property belonging to the joint family of which he is one of the members cannot be seized under section 386(1)(a) of the Code of Criminal Procedure.

[*Chief Justice.*—Suppose it was a debt, could not the undivided share be proceeded against?]

It can be attached in execution of a Civil Court decree—*Deendyal Lall v. Jugdeep Narain Singh*(2). But it cannot be seized under section 386(1)(a) as a property “belonging to” the offender.

* Criminal Reference nos. 18 and 19 and Criminal Revision no. 251 of 1932. Reference made by S. Bashiruddin, Esq., Sessions Judge of Darbhanga, in his letter nos. 665 Criminal and 690 Criminal, dated respectively the 12th and 14th April, 1932 and Application for revision of the order of F. F. Madan, Esq., i.c.s., Sessions Judge of Shahabad, dated the 7th of May, 1932.

(1) (1892) I. L. R. 20 Cal. 478.

(2) (1877) I. L. R. 3 Cal. 198, P. C.

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[*Chief Justice.*—The crops are moveable property and a share in it is *a fortiori* a moveable property. Why can't you proceed against it?]

Because the Criminal Court cannot fix the share of the offender in this summary proceeding. Unless a partition is effected the undivided share cannot become the separate property of any particular coparcener.

[*Chief Justice.*—What will you do if the magistrate makes an order for the attachment of a moveable property?]

I will object on the ground that the property is mine and cannot be proceeded against.

[*Chief Justice.*—You can say that as no rule has been framed under section 386, the magistrate cannot proceed under the general rule when special cases are not provided for.]

Exactly. I rely on *Queen Empress v. Sita Nath Mitra*(1), which supports my contention. My next point is that the magistrate cannot, merely on a Police report, summarily dispose of the objection of a party who contends that the property cannot be seized.

Harnarayan Prasad, for the claimant in Criminal Reference 18 of 1932 :—The magistrate could at best attach the right, title and interest of the offender in the attached property. The entire property belonging to the joint family cannot be seized and sold.

[*Chief Justice.*—Do you concede that the right, title and interest of the offender could be attached?]

I submit that these questions can only arise under section 386(b) of the Code; but under clause (a) only the property "belonging to" the offender can be proceeded against. The case of *Shivalingappa Nijappa Tubchi v. Gurlingava*(2) does not really decide anything against me.

(1) (1892) I. L. R. 20 Cal. 478.

(2) (1925) I. L. R. 49 Bom. 906.

Baldeo Sahay, for the claimant in Criminal Reference 19 of 1932 :—Section 386(1) is inoperative and will remain inoperative so long as rules under sub-section (2) are not framed by the Local Government.

[*Fazl Ali*, J.—The section says “Local Government may frame rules.....”]

[*Agarwala*, J.—Section 146 of the Code of Criminal Procedure authorises the court to attach a property. No rule regarding the mode of attachment is provided for. But nevertheless attachments are made under that section.]

But section 146 does not require the Local Government to frame rules as the Legislature has done in sub-section (2) of section 386. As a matter of fact there is no question of any claim by a third party in a proceeding under section 145 or section 146. Section 145 further requires a notice to be hung at the disputed property. The order operates as an order in rem. Therefore, the considerations arising in cases under section 88 or section 386 do not arise in a case under section 146. “Moveables” do not include “shares in moveables.” It is the article which can be seized and not a share in the article, seizure of which would be physically impossible.

Jaffer Imam, Assistant Government Advocate, for the Crown :—There is no authority for the proposition that the property sought to be attached must be the sole property of the offender. In section 88 of the Code the words used are “property..... belonging to the proclaimed person”. The words “belonging to” are common to both the sections 88 and 386. It has been held in *Secretary of State for India in Council v. Rangasamy Ayyangar*(1) that the interest of an absconder in an undivided property can be attached under section 88. Similarly in *Musammat Gulab Koonwur v. Collector of Benares*(2) and *Juggo-*

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(1) (1916) I. L. R. 39 Mad. 831, F. B.

(2) (1847) 4 Moo. L. A. 246.

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mohun Bukshee v. Roy Mothoornath Chowdry⁽¹⁾ it was held that the purchaser acquired the right, title and interest of the absconder in the undivided property of the joint family. These cases were decided under the Bengal Regulation XI of 1796 where the words used were "held by the absconder". I submit that the principle laid down in these cases applies to the present case.

In *Queen-Empress v. Kandappa Goundan*⁽²⁾ it was held that same considerations apply to section 88 as well as section 386.

The undivided share is as much a moveable property as the whole of it. We cannot read the word "property belonging to the offender" to mean "property solely belonging to the offender."

[*Fazl Ali, J.*—It is a debatable question whether you can take away and sell the entire thing which does not belong to the offender.]

We might apply the analogy of clause (5) of section 88.

B. N. Mitter, in reply.

S. A. K.

Cur. adv. vult.

COURTNEY TERRELL, C.J., AND FAZL ALI AND AGARWALA, JJ.—The facts giving rise to Criminal Reference no. 18 of 1932 were as follows:—

One Ramnandan Missir was convicted under sections 143 and 188 of the Indian Penal Code and under section 17(2) of the Criminal Law Amendment Act. Under the latter section he was sentenced to eighteen months' rigorous imprisonment. Under each of the sections 143 and 188 of the Indian Penal Code he was sentenced to a month's rigorous imprisonment and a fine of Rs. 50. The fine was not paid, with the result that a warrant was issued for its realization. In execution of the warrant a buffalo

(1) (1867) 11 Moo. I. A. 223.

(2) (1896) I. L. R. 20 Mad. 88.

and three chairs which were found on the premises occupied by Rajendra Prasad Missir, father of Ramnandan Missir, were seized. Thereafter Rajendra Prasad Missir appeared before the Magistrate who had issued the warrant and claimed the attached buffalo and chairs, alleging that they belonged not to Ramnandan but to the joint family of which he and the petitioner were members. Rajendra Prasad's objection to the attachment was overruled.

In Criminal Reference no. 19 of 1932 one Mahesh Kand Chaudhry was convicted under section 17 of the Criminal Law Amendment Act and sentenced to pay a fine of Rs. 50. The fine not having been paid, a warrant of attachment was issued and in execution of the warrant twenty-five maunds of paddy, three maunds of marua and certain other articles were seized. Thereupon Deonarain Chaudhry, father of Maheshkant, appeared before the Magistrate, who had issued the warrant, and objected to the seizure. He claimed that the grain and other articles seized belonged to the joint family of which he and his son were members and that they were not the exclusive properties of his son. The objection was overruled by the Magistrate.

The Sessions Judge of Darbhanga has referred both these cases to the High Court under section 438 of the Code of Criminal Procedure. In the opinion of the Sessions Judge the property of the joint family was not attachable in either case in execution of the warrants that were issued, and he therefore recommended that the things seized should in both cases be released from attachment.

The question for decision in Criminal Revision no. 251 of 1932 is precisely the same.

In all these cases the Magistrates who issued the warrants elected to adopt the procedure provided in section 386 (1) (a), i.e., they issued, in each case, a warrant for the levy of the amount of the fine by

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attachment and sale of the moveable property belonging to the offender and the objections in all the cases are that moveable property not belonging to the offender has been seized in execution of the warrant.

Section 386 (1) (a) does not authorize the attachment of any property other than the moveable property belonging to the offender and the question, therefore, arises: in what manner can the moveable property of an offender be attached under that clause when the only moveable property of the offender is an undivided share in the moveable property of the joint family of which he is a member? It is to be observed that the second sub-section of section 386 empowers the Local Government to make rules regulating the manner in which warrants under sub-section (1) (a) are to be executed. We have been unable to ascertain that any rules have been made under this sub-section. Assuming that an undivided share in the moveable property of a joint family may "belong" to an individual member of the family, the assumption premises that other undivided shares belong to other members and I can find nothing in section 386 (1) (a) which authorizes the attachment of these shares. What has been done in the present cases is that things in which the respective offenders as well as others have undivided shares have been physically seized in execution of the warrants that were issued. If this amounts to a legal attachment of the shares in those things of the respective offenders, it is also an attachment of the shares of others for which there is no warrant and which is not authorized by the statute. That seizure is not the proper method by which to reach an undivided share was pointed out by the Privy Council as long ago as 1871 in *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad*⁽¹⁾. In that case, under a remit from the Privy Council to the Court of first instance, to refer to arbitration the accounts of a partnership firm, a reference was duly made to arbitrators. Before any award was made the rights

(1) (1871) 14 Moo. I. A. 40, 50.

and interests of one of the parties were sold by Court in execution of a decree against him in another court by a third party. The question before the Privy Council was whether the expectant claim under an inchoate award was "property" within the meaning of section 205 of the Code of Civil Procedure of 1859, so as to be saleable in execution of a decree. In support of the view that the sale was valid it was argued that the case was analogous to the sale of an undivided share in a joint Hindu family, the contention being that such an undivided share was "property" and was saleable in execution of a decree. The judgment of the Privy Council was delivered by Lord Justice James who said: "No doubt can be entertained that such a share is property and that a decree-holder can reach it. It is specific, existing and definite; *but it is not property the subject of seizure under this particular process*" (i.e. a writ of attachment issued under section 205 of the Code of Civil Procedure of 1859).

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We can conceive of no method by which the undivided share of an individual in moveable property can be seized in the literal physical sense, without at the same time seizing the undivided shares of other persons, and as the statute does not authorize the seizure of such other shares, we are driven to the conclusion that the undivided share of an individual cannot be seized under section 386(1)(a). This was also the conclusion reached by Pigot and Hill, JJ., in *The Queen-Empress v. Sita Nath Mitra*(¹). It is perhaps not without significance that although that case was decided in 1892, the Legislature, when amending section 386 in 1923, left that decision untouched.

In each of these cases, therefore, the property attached will be released.

Order accordingly.

(1) (1892) I. L. R. 20 Cal. 478.