

**SPECIAL BENCH.**

1933.

*Before Courtney Terrell, C.J., Kulwant Sahay and James, JJ.*December,  
4, 5, 21.

SURAJ NARAIN PRASAD SINGH

v.

KING-EMPEROR.\*

*Code of Criminal Procedure, 1898 (Act V of 1898), sections 88, 386, 423 and 439—fine imposed on individual member of joint Hindu family—fine realised by attachment under section 386(1) (a)—money credited to Government—application for refund of fine by other members of family, whether maintainable—claim under section 386(2), when can be entertained—High Court, power of, to order refund.*

*Held, per majority of the Full Bench (Kulwant Sahay, J. contra), that an application by the members of a joint Hindu family for a refund of money belonging to the joint family and attached under section 386(1) (a), Code of Criminal Procedure, 1898, for the levy of a fine imposed upon an individual member of the family is not maintainable after the money realized is credited to the Crown.*

*Ram Chander Pandey v. King-Emperor*(1), referred to.

*Per Courtney Terrell, C.J.—The attachment under section 386, Code of Criminal Procedure, 1898, of the sum previously attached under section 88 ceases to exist and has no force when the amount of the fine has been taken out of the money attached and handed over to the Crown.*

Section 88 provides a complete code for the attachment of the property of absconding persons and claim by persons, other than the absconder, to the property attached but this attachment ceases when the absconder surrenders or is arrested and in any case comes to an end when the subsequent attachment under section 386 is effected.

The use of the words "summary determination" in section 386(2) makes clear the intention of the legislature that the claim is to be determined forthwith before any further

\* Criminal Reference 19 of 1933, made by W. W. Dalziel, Esq., i.c.s., Sessions Judge of Monghyr in his letter no. 1725/X-1, dated 19th/20th June, 1933, against an order of the Subdivisional Officer of Begusarai.

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dealing with the property attached and that after the disposal of the property attached the matter of the attachment must be considered as concluded.

*Per Kuliwant Sahay, J.*—So far as the realization of fine by attachment under section 386(I) (a) is concerned, there is no provision in the Code for any delay between the attachment and the crediting of the money attached to Government. That being so, a claim to the attached property can be entertained if it is made after the attached money is credited to Government.

The claim being maintainable, the court has jurisdiction under section 423(I) (d), read with section 439(I) of the Code, to order a refund of the attached sum.

*Per James, J.*—The claim under section 386(2) must be made promptly and can only be entertained so long as the attachment subsists, that is, between the attachment and the final crediting of the amount of the fine to Government.

If such a claim has been preferred while the attachment subsists, the court must not finally credit the money to Government until the claim has been disposed of.

The facts of the case material to this report are stated in the judgment of Courtney Terrell, C.J.

The case was in the first instance heard by a Division Bench which referred it to a larger Bench.

On this Reference

*Baldeo Sahay* (with him *C. P. Sinha*), in support of the reference:—

The Government has not made any rules under section 386 of the Code of Criminal Procedure as regards limitation.—(*See Bihar and Orissa Gazette*, dated 25th May, 1927, part 2, page 689). That being so, there is no bar to the maintainability of an application for the refund of fine after it is credited to Government. Section 386 would be nullified if the argument of the Crown were to prevail. The investigation into the claim for refund can always be frustrated by the Crown saying that the money has

already gone into the coffers of the Secretary of State who will not in any case refund the money. The court should not take a view of the law which is neither fair nor just.

[CHIEF JUSTICE.—Supposing a property is seized to-day, can the claimant come after a hundred years and claim back the property?]

The remedy lies in the hands of the Government itself. They can make rules under section 386(2) prescribing a period of limitation for the enforcement of such a claim.

[KULWANT SAHAY, J.—Is there any limitation for the realization of fine?]

No.

[Reference was made to sections 386(2) and 439 of the Code, and the cases of *Ramchander Pandey v. King-Emperor*(<sup>1</sup>) and *Rajendra Prasad Missir v. King-Emperor*(<sup>2</sup>).]

*Sir Sultan Ahmad, Government Advocate, for the Crown*:—The magistrate has no jurisdiction to order the refund of fine after the money has been paid to Government. It follows, therefore, that this court has no jurisdiction to make such an order. There is no provision in the Code for such a refund.

[Reference was made to sections 88, 89, 250, 545 and 547 of the Code of Criminal Procedure.]

The application of the petitioner is not one for the investigation of a claim but for the refund of money. The application will lie so long as the attachment subsists.

[KULWANT SAHAY, J.—The attachment subsists so long as the property attached is not sold or credited.]

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Exactly. When the attachment has seized nothing remains to be done. The magistrate is *functus officio*. The petitioner may have a very good case in the civil court, but we cannot make the court of the magistrate an arena for discussions that fall to be considered by the civil court.

The case of *Ramchander Pandey v. King-Emperor*(1) cannot be an authority for the proposition that even where the money has passed beyond the zone of attachment, it must be brought back. I rely on *Queen-Empress v. Kandappa Goundan*(2).

[KULWANT SAHAY, J.—This was a case of sale and property purchased by third person. How can this help you.]

If the property cannot be brought back, the money as well can't be brought back.

[KULWANT SAHAY, J.—In the case of sale, a third person comes in; in the case of fine no third person comes in, but it is the Crown who has to refund the money.]

But the case does not proceed on that basis.

[CHIEF JUSTICE.—You as the Crown are not concerned where the fine has come from—a stranger might choose to pay up the fine.]

Exactly. I was not concerned with the subsequent proceedings. It was a matter between the court and the person concerned. The question of morality and all such considerations are immaterial. I also submit that the order of the magistrate is not open to revision — *Hira Lal v. Emperor*(3).

*Baldeo Sahay*, in reply:—The premise that attachment came to an end is wrong in fact. The record does not show that there has been parting of the money from the magistrate to the Crown even up

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

(3) (1914) 27 Ind. Cas. 550.

to this date. The fine is never credited to Government under the Rules and Circular Orders. It remains within the control of the judicial officer.

[CHIEF JUSTICE.—The amount is deposited in the public treasury to the credit of the Secretary of State.]

See Chapter 1, part VIII, at page 112 of Rules and Circular Orders of the High Court. I have got a right to prefer a claim under section 386 and the rules framed by Local Government. Section 386 does not contemplate a claim only in cases where attachment still subsists.

[JAMES, J.—You can make the claim as soon as the attachment is made; if you prefer it after it ceases to subsist you will be too late.]

If you hold that the attachment was wrong then you must hold that all subsequent acts were wrong and, *in consequence*, make an order for the refund of money.

It is the inherent power of every court to place the parties in the position in which they would have been but for the illegal attachment. The Secretary of State is in the position of a party to the proceeding bound by the order. He cannot be heard to say that although there has been an order against him he refuses to part with the money.

S. A. K.

*Cur. adv. vult.*

COURTNEY TERRELL, C.J.—The facts which have given rise to this reference are as follows:—A prosecution under the Criminal Law Amendment Act had been started against one Ram Sarup Prasad Singh. He absconded and a proclamation and order of attachment under sections 87 and 88 of the Code of Criminal Procedure were issued. Ram Sarup Prasad Singh and another member of the joint family to which he belongs had obtained a joint decree for a sum of Rs. 1,896. This sum was paid on the 9th

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On the 19th January, 1933, a number of other members of Ram Sarup's family applied to the Magistrate for a refund of the entire amount of Rs. 1,896, on the ground that in a case in the High Court the attachment of the property of a joint Hindu family for the levy of a fine imposed upon an individual member had been declared illegal. The Subdivisional Officer rejected the petition and they made an application to the Sessions Judge for reference of the matter to this court. The Sessions Judge acceded to their request and has referred the matter with a recommendation that the order of attachment may be set aside. A Bench of this court directed that notice should be served upon the Government Advocate and he has appeared in opposition to the reference.

On behalf of the petitioners Mr. Baldeo Sahay has referred to the cases of *Ram Chander Pandey v. King-Emperor*<sup>(1)</sup> and *Rajendra Prasad Missir v. King-Emperor*<sup>(2)</sup>. He has urged that if we decide, as he says we must, that the original order for attachment was invalid then under section 423(1) (d) we may make any consequential order that may be just or proper and may direct the Crown to return the fine which was paid to it out of the property attached, as we have under section 439 all the powers of an

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appellate court in the case of a matter referred to us under that section. It is to be noted that there is no question of a setting aside of the fine and no question as to whether it was properly inflicted. Therefore, in my opinion, there is no analogy with the procedure for the recovery of a fine held to have been improperly inflicted nor is there any analogy with a similar procedure for the recovery of compensation held to have been improperly awarded. The attachment under section 386 of the sum previously attached under section 88 has ceased to exist and had no force when the amount of the fine had been taken out of the money attached and handed over to the Crown. Section 386 contemplates the summary determination of claims made by a person other than the offender in respect of any property attached and the local Government is empowered to make rules regulating the manner in which the warrants are to be executed and for the summary determination of such claims and, in my opinion, it is clear that such claims and such procedure are concerned only with the attachment and not with the return of fines after they have been credited to Government and the attachment has ceased. Section 88 provides a complete code for the attachment of the property of absconding persons and claims by persons other than the absconder to the property attached but this attachment ceased when the absconder surrendered or was arrested and in any case came to an end when the subsequent attachment under section 386 was effected. The use of the words "summary determination" in section 386(2) makes clear the intention of the legislature that the claim is to be determined forthwith before any further dealing with the property attached and that after the disposal of the property the matter of the attachment must be considered as concluded. The matter is analogous to attachment by a Civil Court pending the determination of a suit. As long as the order of attachment remains in force proceedings may be taken to set it aside but when the court directs in the determination of the suit that the property attached is to be handed

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over to one of the parties the remedy of any one aggrieved is not in respect of the order of attachment. For this reason I am of opinion that the reference should be rejected. If the claimants have any rights against the Crown they may proceed by a regular suit. The Government Advocate states that the balance of Rs. 396 now lying in deposit is at the disposal of the petitioners if they should care to withdraw it.

KULWANT SAHAY, J.—I regret I am unable to agree with my Lord the Chief Justice. The question whether the undivided share of a member of a joint Hindu family can be attached in execution of a warrant issued under section 386(1) (a) of the Code of Criminal Procedure has been settled so far as this court is concerned by the decision of the Special Bench in *Rajendra Prasad Missir v. King-Emperor*(1). It was there held that such undivided share cannot be seized under section 386(1) (a). It is, therefore, clear that the attachment of the money in realization of the fine under section 386 (1) (a) in the present case was illegal. The question then is whether the claim preferred by the petitioners to the attached money and their application for refund of the same should be entertained. Before the learned Sessions Judge the objection taken on behalf of the Crown was that the application was barred by limitation on the analogy of the limitation prescribed under section 88 of the Code. The learned Sessions Judge found that there was no period of limitation and the learned Government Advocate in this court does not press the point that there is a period of limitation. No period of limitation is provided for in section 386 or in the rules framed by Government under section 386(2) of the Code which are to be found in notification no. 251-J.R.1., dated the 17th of May, 1927, published in the *Bihar and Orissa Gazette, 1927*, part II, page 689, and reproduced in the Supplement

(1) (1932) I. L. R. 12 Pat. 20, S. B.



to the Bihar and Orissa Local Statutory Rules and Orders, 1927, Volume II, page 11.

It is, however, contended that such application can be entertained only so long as the attachment lasts and before the money attached is credited to Government in realization of the fine. Now, there is no provision in the Code for any delay in the attachment of money seized under section 386(1) (a) and the crediting of the same to Government. There is provision in the Code for some delay in the attachment and sale of other moveable properties. There is also provision in section 250 as regards the payment of compensation to an accused person being postponed up to the period allowed for the presentation of an appeal, or after an appeal is presented, up to the disposal thereof. There is also a period provided for under section 545(2) as regards postponement of the payment of compensation till the period of appeal has expired. These provisions relate to payments contemplated to be made to third persons and not to payments credited to Government by way of realization of fine. So far as the realization of fine by attachment under section 386(1) (a) is concerned, there is no provision for any delay between the attachment and the crediting of the money attached to Government. It is no doubt true that in the present case there was a delay of 4 or 5 days; but the Magistrate was not bound to postpone the crediting of the sum to Government even by a single day. If there is no such provision, is it right to say that a claim to the attached property cannot be entertained if it is made after the attached money is credited to Government? It is no doubt true that in the present case the delay was very great and there ought to be a time limit beyond which such applications ought not to be entertained; but whether deliberately or by inadvertence, the legislature has omitted to make any such provision. It is, therefore, not open to us to say that the application cannot be entertained because it has been made after the attached sum has been

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credited to Government. It may be that the legislature deliberately omitted to make any provision for delay in other cases as contemplated by sections 250 and 545, because there could be no difficulty in refunding the money as it would not pass to third persons but would remain in the treasury. I am, therefore, of opinion that there was no bar to the maintainability of the application and it ought to be entertained. If the application is entertained then there can be no doubt that the court has jurisdiction to order a refund [section 423 (1) (d) read with section 439(1) of the Code of Criminal Procedure].

JAMES, J.—On the 19th of January, 1932, a pleader, acting on behalf of Ramsarup Singh and his brother Suraj Narain Prasad Singh in execution proceedings, withdrew the sum of Rs. 1,896 to which they were entitled. The money was at once attached by the Subdivisional Magistrate under section 88 of the Code of Criminal Procedure on account of a proclamation and order of attachment under sections 87 and 88 which had issued against Ramsarup Singh. A week later Ramsarup was arrested, and he was ultimately convicted and fined fifteen hundred rupees. On the 25th of February, 1932, the amount of the fine was again attached out of the money which was in deposit under section 88; and it was credited to Government on the 1st of March. On the 19th of January, 1933, Suraj Narain Prasad Singh together with his sons and a son of Ramsarup made a claim before the Magistrate for the money which had been confiscated for Ramsarup's fine, on the ground that attachment of joint Hindu moveable property had been declared illegal by a Special Bench of the High Court. The Subdivisional Magistrate held that he had no authority to order repayment of a sum already credited to Government revenue and so declined to entertain the petition of claim. The petitioners then moved the Sessions Judge of Monghyr who has referred the case for the orders of the High Court. Before the Sessions Judge the claim of the petitioners

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was contested on the ground that although no period of limitation is prescribed by section 386 of the Code of Criminal Procedure, which deals with the procedure for realisation of fines, the same period of limitation would apply to an application made under that section by a third party as would apply to a claim by a third party to property attached under section 88 of the Code of Criminal Procedure. Some attempt was apparently made to demonstrate to the learned Sessions Judge that there was authority for this view, but he found that there was none. As the learned Sessions Judge remarked, the decision cited before him was mainly an authority for the view that a third party claimant must go to the Civil Court; but he observed that the claims of third parties had been considered by the Patna High Court in the case of *Ramchander Pandey v. King-Emperor*<sup>(1)</sup> so that it could not be held that a claim by a third party could not be entertained by courts subordinate to this court. The learned Sessions Judge remarked that the justice of the petitioners' claim could hardly be contested in view of the decision in *Ram Chander Pandey's* <sup>(1)</sup> case, the effect of which appears to have been misunderstood. In that case property which had been in the possession of a deceased coparcener was attached; and it was observed by the court that this could not be regarded as the property of the deceased coparcener, because any right which he possessed had passed away on his death, and the rest of the family had not inherited from him; their shares in the property had merely been enlarged by the operation of survivorship. A case more in point is that of *Rajendra Prasad Misser v. King-Emperor*<sup>(2)</sup>; though even there it was not held that joint family property could not be attached under section 386 of the Code of Criminal Procedure. If the claim of the petitioners had been preferred in time, they could probably have succeeded

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on the strength of that decision, which was to the effect that joint family property could not be seized in satisfaction of a sentence of fine on one of the coparceners by a warrant issued under sub-section (1) (a) of section 386.

Mr. Baldeo Sahay on behalf of the petitioners argues that the Subdivisional Magistrate ought to have entertained the claim, because no period of limitation is prescribed by section 386(2) of the Code of Criminal Procedure, and he argues that therefore a third party may make a claim at any time whether the property attached has been finally credited to Government or not. The learned Government Advocate on the other hand argues that the magistrate has jurisdiction to enquire into the claim under section 386 only between attachment and sale or rather between attachment and the final crediting of the amount of the fine to Government. In my judgment the argument of the learned Government Advocate must prevail. The learned Subdivisional Magistrate acted rightly in declining to entertain the application, because when the application was made there was no subsisting attachment which he could declare invalid. The claim made under sub-section (2) of section 386 must be made promptly and can only be entertained so long as the attachment subsists. If such a claim has been preferred while the attachment subsists, the court must not finally credit the money to Government until the claim has been disposed of; but the summary determination of claims under sub-section (2) of section 386 can only be made while the attachment is subsisting.

I would, therefore, dismiss the application of the petitioners and discharge the reference.

*Order of the Court.*

The reference will be discharged and the application of the petitioners dismissed.

*Reference discharged.*