CRIMINAL REVISION.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1936

Aug. 26.

U BA HLAING
v.
BALABUX SODANI.*

"Inquiry"—"Judicial proceeding"—Criminal Procedure Code (Act V of 1898), s. 512 (1)—Proceedings under s. 512 (1) not an inquiry—Object of s. 512 (1)—Order for disposal of property—Appeal against order—Criminal Procedure Code (Act V of 1898), ss. 517, 520 and 523—Finding of facts against accused in his absence without jurisdiction—Disposal of property under s. 523—Conflicting claims—Person entitled to possession.

Every inquiry or trial is a judicial proceeding, but every judicial proceeding under the Code is not an inquiry or trial. The Code contemplates proceedings which are neither an inquiry nor a trial, *e.g.*, ss. 94, 95, 503, 506, 509, 511. The object of the provisions of s. 512 (*1*) is solely to record in a particular way and under particular circumstances, depositions of witnesses which may in the future be used against the accused person when he is apprehended and brought to trial. The inquiry as to whether the accused person has absconded is only preliminary, and is held in order to bring the provisions of the sub-section into operation and to give the Court jurisdiction to record the depositions. Therefore proceedings under s. 512 (*1*) of the Code are judicial proceedings which are not an inquiry.

Golab Singh v. *Abdul Rashid*, P.J. (1897) L.B. 324—*overruled.*

An order made at the conclusion of such proceedings for the disposal of property produced before the Court is made under the provisions of s. 523 of the Code, and not under the provisions of s. 517, and therefore no appeal lies against such an order.

P.R.V.N. Valliappa Chetty v. *Joseph*, 2 Bur. L.J. 85—*approved.*

In the matter of Lakshman, I.L.R. 26 Bom. 552—*dissented from.*

The applicant made a first information report at a police station of criminal breach of trust against his absconding serang who, the applicant alleged, had sold the paddy entrusted to him to the respondent instead of delivering it elsewhere as ordered by the applicant. The respondent admitted the purchase of paddy from the serang, but denied that there was any breach of trust and contended that the sale to him was valid. The magistrate recorded evidence under s. 512 (*1*) and directed the respondent to deliver the paddy or to pay its value to the applicant. On appeal against this order the Sessions Judge held that the respondent was entitled to the possession of the paddy or its value, and that the applicant must bring a civil action to establish his claim.

* Criminal Revision No. 342B of 1936 from the order of the Sessions Judge of Arakan.

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Held, that no appeal from the order of the magistrate lay to the Sessions Judge and that the order of the latter was made without jurisdiction.

Held also, that in proceedings under s. 512 (*1*) of the Code the magistrate had no jurisdiction to come to a finding as to the accused's alleged guilt in his absence, and that he had no authority to arrive at conclusions regarding facts which were in dispute between the contending parties. Under s. 523 of the Code and in the circumstances of the case the respondent was entitled to the immediate possession of the money representing the paddy.

K. C. Bose for the applicant. There is a distinction between the definitions of "an inquiry" and "a judicial proceeding" in sub-sections (*k*) and (*m*) respectively of s. 4 of the Criminal Procedure Code. An "inquiry" is a "judicial proceeding," but the converse is not true in every case. Proceedings under s. 512 (*1*) of the Code are not inquiries though they may be judicial proceedings. That section occurs in a chapter dealing with special rules of evidence, and the object of that section is merely to obtain evidence for use at the subsequent regular inquiry when the accused is found. This section could as well have found a place in the Evidence Act as section 32A.

The order in this case was really one under s. 523 though it was purported to be made under s. 512. No appeal lies against an order made under s. 523 and the order of the Sessions Judge is therefore void and should be set aside. The order of the trial Court directing the restoration of the property to the applicant should stand.

[GOODMAN ROBERTS, C.J. Can the trial Court usurp the functions of a civil Court and decide questions of title in a proceeding under s. 523 ?]

To a limited extent the answer has to be in the affirmative. If a third party is brought into the proceeding the Court has to decide whether he has any right to the property in respect of which the offence is committed.

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Further the serang in this case was in possession of the property on behalf of the applicant. Therefore since the applicant must be deemed to have been in constructive possession of the property all along it should be returned to him. S. 523 uses the words " entitled to possession," and in cases falling within that section the magistrate exercises a discretion in the disposal of the property. See *In the matter of Lakshman Govind* (1) ; *P.R.T.N. Valliappa Chetty* v. *S. Joseph* (2).

Ba Han for the respondent. S. 517 is the proper section applicable. As to the meaning of the word " inquiry " see *Golab Singh* v. *Abdul Rashid* (3) ; *Hema Singh* v. *King-Emperor* (4) ; *Sher Muhammad* v. *The Crown* (5).

The respondent has a number of defences open to him if a civil action is commenced against him, as for instance, that the serang while disposing of the property was really acting as the agent of the applicant or that the applicant has ratified the sale subsequently by his telegram. In such circumstances the magistrate was not justified in returning the property to the applicant, and the finding of the Sessions Judge therefore is correct on the merits and should not be disturbed.

GOODMAN ROBERTS, C.J., and DUNKLEY, J.—In this case the applicant U Ba Hlaing made a first information report at Kyaukpyu police station of criminal breach of trust, under section 408 of the Indian Penal Code, against one Esoof, who was the serang of his boat. He alleged that he had sent the serang with the boat containing 5,800 baskets of paddy to Akyab to be delivered to a certain person there, and that in violation

(1) I.L.R. 26 Bom. 552.
(2) 2 B.L.J. 85.
(3) P.J. (1897) L.B. 324.
(4) I.L.R. 9 Pat. 155.
(5) I.L.R. 3 Lah. 431.

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of this trust Esoof had taken the boat to Kyaukpyu and had sold the paddy to the respondent, Balabux Sodani, for a sum of Rs. 2,544-10-0, and had then sunk the boat and absconded. The respondent admitted purchasing the paddy from Esoof, but denied that Esoof had sold the paddy in violation of any trust imposed upon him by the applicant. So far as the title to the paddy is concerned, there are plainly open to the respondent a number of defences, such as that Esoof, in selling the paddy, acted as the authorized agent of the applicant, or that the applicant had ratified the sale by Esoof.

The proceedings for the record of evidence under the provisions of section 512 (*1*) of the Code of Criminal Procedure were conducted before the Subdivisional Magistrate of Kyaukpyu, and, relying upon the remarks of my learned brother Ba U in his judgment of the 23rd September, 1935, after he had finished the record of evidence the Subdivisional Magistrate heard the applicant and the respondent and, by a considered order dated the 5th November, 1935, he directed that the respondent should deliver over to the applicant the 5,800 baskets of paddy or their value Rs. 2,544-10-0. Against this order an appeal was instituted before the learned Sessions Judge of the Arakan Division under the provisions of section 520 of the Code of Criminal Procedure, and the order of the Subdivisional Magistrate has been reversed by the learned Sessions Judge and he has directed that the respondent is entitled to the immediate possession of the paddy, or, in the events which have happened, the value thereof, and that the applicant must bring a civil action to establish his claim. This present application in revision has been made against the order of the learned Sessions Judge, which is dated the 16th March, 1936.

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The contention on behalf of the applicant is that the order of the Subdivisional Magistrate was not made under the provisions of section 517 of the Code of Criminal Procedure, but was made under the provisions of section 523, and, therefore, no appeal lay from his order, and, consequently, the order of the learned Sessions Judge was made without jurisdiction. In our opinion this contention is correct.

In the course of his judgment of the 23rd September, 1935, Ba U J. said that a proceeding under the provisions of section 512, sub-section (*1*), of the Code of Criminal Procedure is an " inquiry " within the definition of that term in section 4 (*1*) (*k*) of the Code, and therefore at the conclusion of the proceeding an order for the disposal of property produced before the Court can be made under the provisions of section 517. But these remarks were *obiter*, being made solely for the guidance of the Magistrate who was about to deal with the proceeding under section 512, and, with the greatest respect, we must dissent from this view.

Section 517 (*1*) of the Code says that " when an inquiry or trial in any criminal Court is concluded the Court may make such order as it thinks fit for the disposal, etc." Consequently, if a proceeding under section 512 (*1*) is an inquiry, an order for disposal of the property produced before the Court in such a proceeding is made under section 517, and therefore there is an appeal under section 520 against that order ; but, in our opinion, it is plain that a proceeding under section 512 (*1*) is not an inquiry.

" Inquiry " is defined in section 4, sub-section (*1*), clause (*k*), of the Code, which is as follows :

" ' Inquiry ' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court."

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"Judicial Proceeding" is defined in section 4 (*1*) (*m*) of the Code, and is as follows :

"'Judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath."

It is, therefore, clear that every inquiry or trial is a judicial proceeding, but every judicial proceeding under the Code is not an inquiry or trial. The provisions of numerous sections show that the Code contemplates proceedings which are neither an inquiry nor or a trial, *e.g.*, sections 94, 95, 503, 506, 509 and 511.

Section 512 (*1*) occurs in the Chapter headed "Special Rules of Evidence," and it provides that the depositions recorded under the provisions of the section may be given in evidence against the accused person on the inquiry into, or trial for, the offence, thereby plainly indicating that the proceedings under the section do not themselves constitute an inquiry. The object of the provisions of section 512 (*1*) is solely to record, in a particular way and under particular circumstances, depositions of witnesses which may in the future be used against the accused person when he is apprehended and brought to trial. There is no inquiry, for there is nothing into which an inquiry can be made. The sub-section is, in fact, directed merely to the record of evidence and nothing more. It is in contradistinction with sub-section (*2*) of section 512, under which there has to be an inquiry whether an offence punishable with death or transportation has been committed or not by some unknown person.

It is urged that under sub-section (*1*) there has to be an inquiry whether the accused person has absconded and there is no immediate prospect of

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arresting him, and this is so ; but this preliminary inquiry is merely held in order to ascertain the fact necessary to bring the provisions of the sub-section into operation and to give the Court jurisdiction to record the depositions ; there is no finding which is binding on anyone or for any purpose. Consequently it must be held that proceedings under section 512 (*1*) of the Code of Criminal Procedure are judicial proceedings which are not an inquiry, and in this regard, with all due respect, the case of *Golab Singh* v. *Abdul Rashid* (1) was, in our opinion, wrongly decided. Hence an order made at the conclusion of such proceedings, for the disposal of property produced before the Court, is made under the provisions of section 523 of the Code, and not under the provisions of section 517, and, therefore, no appeal lies against such an order.

In support of the applicant's contentions we had also cited to us the case of *In the matter of Lakshman Govind Nirgude* (2). All that is necessary to say about that case is this, that if Fulton J. in his judgment on page 558 meant that the Magistrate should come to a conclusion in the absence of an accused person as to whether a criminal offence had been committed by him in order to come to a decision as to the person entitled to the possession of the property under section 523, we must respectfully dissent from his conclusions. We agree with the decision of May Oung J. in *P.R.V.N. Valliappa Chetty* v. *S. Joseph* (3), in which he pointed out that the normal course of restoring the property to the person from whom it is seized should in cases such as these be followed, and the dissatisfied party should be

(1) P.J. L.B. 324. (2) (1902) I.L.R. 26 Bom. 552.
(3) 2 Bur. L.J. 85.

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left to seek his remedy in a civil Court. Of course, if the property were seized from the servant or agent of the principal owner, and the fact of employment or agency were admitted, the property would rightly be restored to the master or principal. We hold, in agreement with the *obiter dictum* of May Oung J., that a proceeding under section 512 (*1*) is neither an inquiry nor a trial within the meaning of section 517. Consequently, the proceedings on appeal before the learned Sessions Judge of Arakan were without jurisdiction, and are void, and the learned Sessions Judge's order of the 16th March, 1936, must be set aside.

But the merits of the case would have been met by the learned Session Judge's order had he had jurisdiction to make it. For the purpose of making his order of the 5th November, 1935, the Subdivisional Magistrate had to refer to the provisions of section 27 of the Sale of Goods Act, and come to a definite finding of fact that the accused person, Esoof, had no right to sell this paddy, and he could not come to this conclusion without deciding, in the absence of the accused, that the accused had committed an offence of criminal breach of trust. He had no jurisdiction in the proceedings under section 512 (*1*) to come to any findings of fact to the prejudice of the accused in the latter's absence, except the necessary preliminary finding, warranted by the terms of the section, that the accused had absconded and there was no immediate prospect of arresting him. In arriving at a finding as to the accused's guilt of the offence with which he was charged in the first information report, the Subdivisional Magistrate exercised a jurisdiction which was not vested in him. Ba U J. said in the course of his judgment of the 23rd September, 1935, that by an order made under

section 523 of the Code the property must be returned to the person from whom it was seized; but, with the greatest respect, this dictum is not in accordance with the terms of the section itself, which says that the Magistrate "shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof." Therefore, if an order for delivery is made by the Magistrate, it must be for delivery to the person entitled to the immediate possession of the property. It must be conceded that, on the materials which are ordinarily available when an order under section 523 is made, the person entitled to the immediate possession of the property is usually the person from whom it was seized; but one can readily imagine circumstances under which the indisputable facts, or facts admitted by the parties contending for the possession of the property, show that a person other than the person from whom the police seized the property is entitled to the possession thereof. For instance, if a thief be caught with stolen property in his possession, and the property is seized from him, but the thief himself succeeds in making good his escape, then surely the order under section 523 would not direct the return of the property to the thief. Also, when the person from whom the property is seized admits or alleges that the property was left in his temporary custody by some other person, it could not be returned to him; and, equally, it could not be returned to him if he admitted that the property was found on his premises, but alleged that it was there without his knowledge. But where, as under section 512 (*1*), the proceeding before the Magistrate is neither an inquiry nor a trial, the Magistrate has no authority to arrive at conclusions regarding facts

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which are in dispute between the contending parties in order to decide which of these parties is the person entitled to the possession of the property; he must give possession to the person so entitled, having regard to the indisputable or admitted facts, and leave the contending parties to fight out their rights in a civil Court.

In the present case, it is clear that on the admitted facts the person entitled to the immediate possession of the money representing this paddy is the respondent. Therefore, the order of the Sub-divisional Magistrate of Kyaukpyu, dated the 5th November 1935, is wrong, and it must be set aside; and, instead thereof, it must be directed that the money shall remain in the possession of the respondent, Balabux Sodani, until the applicant U Ba Hlaing has established his title thereto in appropriate civil proceedings brought for the purpose.