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tender of pardon was made to him, committed him along with the other accused for trial by the Sessions Court. We think that the commitment is illegal. Section 337 of the Code of Criminal Procedure provides that every person accepting a pardon shall be examined as a witness in the case, and if not on bail shall be detained in custody until the termination of the trial by the Court of Session. It seems, therefore, to be clear that nothing can be done against him till after the case in the Court of Session has been finished, and that then his trial should be commenced *de novo*. This is what has been decided by the other High Courts in India —*Queen Empress* v. *Sudra*(1), *Queen Empress* v. *Malua*(2), *Queen* v. *Petumber*(3), *Queen* v. *Bipro Dass*(4), *In re Joyudee Paramanick*(5), *Queen Empress* v. *Rama*(6)—and we follow them. The commitment is quashed. After the trial in the Sessions Court is finished, proceedings can, if it is thought necessary, be taken against him.

(1) (1891) 14 All., 336.
(2) (1892) 14 All., 502.
(3) (1870) 14 Cal. W. R., 10 (Cr. Rul.)
(4) (1873) 19 Cal. W. R., 43 (Cr. Rul.)
(5) (1880) 7 Cal. L. R., 66.
(6) (1892) 15 Mad., 352.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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November 15.

NARAYAN GOVIND *v.* VISAJI.*

Criminal Procedure Code (*Act X of* 1882), *Secs.* 522, 523, 524—*Order to restore possession of immoveable property.*

An order made under section 522 of the Criminal Procedure Code (Act X of 1882) restoring possession of immoveable property to a person who has been dispossessed of it by criminal force, is an independent order and may be made subsequently to the date of the conviction of the offender. It need not be made at the same time as the conviction.

The case contemplated by section 522 is that of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case the section gives the Magistrate power to order possession to be restored to the complainant. In the case of a proper order, third persons could not be affected; if they are, the order is not thereby necessarily invalid. Clause 2 of the section gives them a remedy by civil suit.

* Criminal Reference, No. 89 of 1898.

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On 27th September, 1897, complainant charged one Ravlo with criminal trespass under section 447 of the Indian Penal Code (Act XLV of 1860). He alleged that in the previous July, Ravlo had entered into possession of the land and sowed rice upon it, and that when in the month of September, 1897, he (the complainant) went to the field, Ravlo had turned him out by force and refused to vacate the land. On the 17th November, 1897, the case was heard by the Third Class Magistrate, who convicted Ravlo of the offence charged.

On the following day (18th November, 1897) the complainant applied to the Magistrate under section 522 of the Code of Criminal Procedure (Act X of 1882) to be restored to possession of the land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant, but attached the crops under Chapter XLIII of the Criminal Procedure Code.

Thereupon one Visaji intervened and claimed the crops as having been sown by himself. His claim was disallowed, and the crops were ordered to be sold and the proceeds credited to Government under sections 523 and 524 of the Code.

Held, that the order made by the Magistrate under section 522 restoring possession of the land to the complainant was bad, because it did not appear that the offence of which the accused was convicted was attended with criminal force, and that the dispossession was due to the use of such force. The illegal entry complained of had taken place in July, 1897. The accused then took possession, and in September, being then still in possession, forcibly resisted the complainant when he attempted to enter upon the land. The complainant, however, did not charge the accused with this assault, but with the trespass which had taken place in July. It is only when the actual use of criminal force leads to dispossession that an order under section 522 can be made.

Held, also, that the order passed under sections 523 and 524 with reference to the crops were illegal. The crops were not property in respect of which the offence was committed, nor were they used in the commission of the offence. They were not such property as is referred to in section 517, 523 or 524 of the Criminal Procedure Code.

Held, also, that the Third Class Magistrate, as such, had no authority to make an order under section 524.

REFERENCE under section 438 of the Criminal Procedure Code (Act X of 1882).

On the 27th September, 1897, complainant Narayan charged the accused Ravlo with criminal trespass upon his field under section 447 of the Indian Penal Code (Act XLV of 1860).

The complainant stated that in July, 1897, Ravlo had illegally entered upon the land in question and sowed rice there, and that

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in September, when the complainant went to the field, Ravlo had turned him out of it and had refused to vacate the land.

The case was heard by the Third Class Magistrate on the 17th November, 1897, and he convicted Ravlo of the offence charged.

On the following day (18th November, 1897) the complainant applied to the Magistrate under section 522 of the Criminal Procedure Code (Act X of 1882) to be put into possession of the land and of the rice crop on it. The Magistrate thereupon ordered possession to be given to the complainant, but directed that the crop should be attached under Chapter XLIII of the Criminal Procedure Code. Subsequently, however, as Ravlo disclaimed all interest in the crop, the Magistrate ordered that after deducting expenses it should be made over to the complainant.

One Visaji then intervened and claimed the crops, alleging that he had sown them, but his claim was disallowed.

Possession of the land was duly given to the complainant on the 29th January, 1898, but the crops were subsequently sold under sections 523 and 524 of the Criminal Procedure Code (Act X of 1882) and the proceeds credited to Government.

Visaji then applied to the District Magistrate, alleging that he had been in possession both of the land and the crops, and had been illegally deprived of both by the order made by the Third Class Magistrate. The District Magistrate thereupon made this reference to the High Court, being of opinion that the order made by the Third Class Magistrate under section 522 on the 18th November, 1897, was illegal, because (1) it had not been made at the time of the conviction, and (2) because it prejudiced the right of the intervenor Visaji, contrary to clause 2 of that section.

The reference was as follows:—

"It appears to me that an order under section 522 must be passed at the time of conviction, not subsequently, as was done here. The words of the section are 'whenever a person is convicted,' not 'has been convicted.' In that case I might have considered the order when hearing the appeal from the conviction. But as it is, the order stands separate, and there is no appeal from it.

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"Besides the above reason, I think the order is bad, as it prejudices the right of a third party who was not concerned in the original criminal case."

The reference was heard by a Divisional Bench (Parsons and Ranade, JJ.).

G. S. Mulgavkar for complainant.

B. N. Athavle for Visaji.

PARSONS, J.:—The District Magistrate has referred this case on the ground that the order of the Third Class Magistrate passed under section 522 of the Code of Criminal Procedure is illegal, because it was not passed at the time of conviction and because it prejudices the right of a third party who was not concerned in the original criminal case. The first objection I do not consider to be a tenable one in the present case. The District Magistrate considers that the use of the words "is convicted" necessitates a simultaneous order of restoration which would not have been so had the words used been "has been convicted," but I do not think his view is correct. All that the words mean is that there must be a conviction first had, and then the order can be made. No Magistrate probably would make such an order unless he was asked to do so, and there must be some time allowed for that. Similar words are used in section 519, but there an application is provided for. Section 522 makes no mention of any application, but the words used clearly allow of such being made and give jurisdiction to the Magistrate to make the order after conviction on such application. His order may be considered to be but a continuation of the former proceedings, and he would be the best person to judge whether or not on account of delay the application should be granted. Here there was no delay. The application was made immediately after the conviction, and the order of the Magistrate was passed on the 25th November.

The second objection raised by the District Magistrate seems to be dealt with and provided for by clause 2 of section 522. What the law evidently contemplates is the case of a person in possession (the complainant) being dispossessed by force by another person (the accused) and the latter being in possession at the date of conviction. In such a case it gives the Magistrate power

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to order the complainant to be restored to possession. In the case of a proper order, third persons could not be affected; if they are, then they are given a remedy by civil suit, and the order would not on that account be necessarily bad.

In the present case, however, the order is bad, because, as pointed out by my colleague, the complainant was not dispossessed by the accused by force. The accused had possession both prior to and at the time the force was used. The order, therefore, must be reversed.

The other orders passed by the Third Class Magistrate as to the cutting, gathering, storing, and afterwards selling the crops that were on the land, are clearly illegal. The Magistrate seeks to justify them under sections 523 and 524; but section 523 has no application to the case, and the Magistrate was not empowered to act at all under section 524. These orders must also be reversed.

RANADE, J.:—The principal point raised in this reference relates to the construction to be placed on section 522 of the Code, and appears not to have been previously decided in any reported case. It was formerly raised in a reference made to the Calcutta High Court, but the case was disposed of on other grounds which made it unnecessary to decide the question—*Ram Chandra Boral* v. *Jityandria* [1].

The facts so far as they bear on the point to be considered appear to be, shortly, these. One Narayan Govind obtained possession through the Court of a certain field in execution of his decree against Ravlo Bhagwant in September, 1896. On 27th September, 1897, Narayan brought a complaint against Ravlo of criminal trespass under section 447, in which he stated that Ravlo had illegally entered upon possession of the land about a month and a half previously, and sowed it with rice, and when Narayan went to the field, Ravlo pushed him out and refused to vacate the land or pass a *kabuláyat*. The complaint was heard by a Third Class Magistrate, who convicted Ravlo under section 447, and fined him Rs. 15 on 17th November, 1897. The Magistrate found that Narayan had obtained possession through the Court,

[1] (1897) 25 Cal., 434.

and that Ravlo had illegally entered upon the land and raised a rice crop on it and had pushed out Narayan when he went to the land in September, 1897. On the 18th of November, 1897, Narayan applied under section 522 to be placed in possession of the land with the rice crop in it. The Magistrate passed an order directing that possession of the land should be given to Narayan, and that the crops should be attached under Chapter XLIII. Later on, as Ravlo had disclaimed all interest in the crops, the Magistrate directed that after deducting expenses the crops should be given to Narayan.

At this stage one Visaji intervened, and put in a claim to the crops as having been sown by him. His objection was overruled, and the land was made over into Narayan's possession on 29th January, 1898. The crops were subsequently sold under sections 523 and 524, and the proceeds were credited to Government. Visaji, the intervenor, then applied to the District Magistrate complaining that he was in possession of the land and had raised the crops, and that he was illegally deprived of the possession of both. The District Magistrate thereupon made the present reference on the ground that the order about the restoration of the possession of the land was illegally made, as such an order under section 522 can only be made at the time of the conviction, and not subsequently. He was of opinion that the order could not be enforced against the intervenor Visaji.

I do not think that the order in question was illegal on either of the grounds stated in the reference. The words used in section 522 are "whenever a person is convicted" and might suggest the interpretation put upon them by the District Magistrate that the order about the possession of the land must be made simultaneously with the conviction of the offence. On a careful consideration, however, of the other sections in the same chapter, which relate to the disposal of moveable property in respect of which an offence has been committed, it is clear that this order is an independent order, and all that section 522 contemplates is that the order can only be made on conviction of the offence. These are the very words used in section 521, which precedes section 522. Section 520 similarly empowers Courts of Appeal

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or Revision to make any order modifying orders made under sections 517, 518, 519. Section 519 expressly contemplates a separate application in respect of orders to be passed under it after conviction. The ruling in *Mohunt Luchmi Dass* v. *Pallat Lall* (1), on the corresponding section 534 of the old code, shows that the order is to be based on the finding. The words used in the judgment are "the foundation of the order should be the finding of the Court." In *Ram Chandra Boral* v. *Jityandria* (2) the application was made six months after the conviction. The legality of the order was questioned on this ground, but as the point was not decided, no great stress can be laid on this ruling. On the whole, however, it appears to me that the order in this case made on an application presented the next day after the conviction, was not illegal on the ground stated in the reference.

As regards the second ground, it is clear that the law has provided in paragraph 2 of the section an express remedy for the third parties dispossessed without right, and the intervenor Visaji must be left to his remedy.

While I do not think that the order of the Third Class Magistrate can be set aside on the grounds set forth in the reference, I feel satisfied that the order is illegal on two other grounds, which affect its merits. The section evidently contemplates (1) that the offence of which the accused is convicted must be an offence attended by criminal force, and (2) that the Court must be satisfied that the dispossession was due to the use of such force. Neither of these conditions are satisfied in the present case. The offence charged was criminal trespass, which is defined in section 441 of the Indian Penal Code. Criminal force is defined in section 350, Indian Penal Code. Criminal force is not a necessary element or ingredient of criminal trespass, though when the trespass is committed with an intent to annoy or insult or intimidate, there may be such an ingredient. In the present case, the illegal entry on the land, according to the complainant himself, took place in July, 1897, when Ravlo is alleged to have sown it with rice. Complainant went to the place to-

(1) (1875) 23 Cal. W. R. 154, Cr. Rul. (2) 1897) 25 Cal., 434.

wards the close of September, and Ravlo refused to vacate or pass a *kabuláyat*, and pushed out complainant. Complainant did not bring any charge for this assault, but complained of the trespass which took place some months before. Under these circumstances, it is clear that the offence complained of was not attended by criminal force, nor did the use of such force cause the dispossession. The decision in *Mohunt Luchmi Dass* v. *Pallat Lall*[1] shows clearly that the actual use of criminal force leading to the dispossession complained of, is a necessary condition, and it is only where this is the case that an order under section 522 can be passed. The decision in *Ram Chandra Boral* v. *Jityandria*[2] shows clearly that the words "Offence attended by criminal force" mean an offence of which criminal force is an ingredient. Mere show of criminal force will not suffice to satisfy the requirements of the section. There must be actual use of force, and of criminal force resulting in the dispossession. Both these necessary ingredients are wanting in the present case, and on this ground I must hold that the order about restoration of possession made by the Third Class Magistrate was without jurisdiction, and must be set aside.

The order about the crops was also clearly illegal, as these crops were not property in respect of which the offence was committed, nor were these crops property used in the commission of the offence. The Magistrate could not, therefore, deal with them under section 517, nor could he deal with them, as he professed to deal, under sections 523 and 524, as they were not property referred to in section 51, or alleged or suspected to be stolen. As a Third Class Magistrate, he had, further, no authority to act under section 524 in directing that the crops should be sold and the proceeds should be credited to Government.

Under these circumstances I would reverse both the order about the possession of the land and the disposal of the crops.

Order reversed.

(1) (1875) 23 Cal. W. R., 54, Cr. Rul. (2) (1897) 25 Cal. 434.