Teeka and Others

Vs

State of Uttar Pradesh

Criminal Appeals Nos. 79 and 89 of 1959

(K. Subha Rao, Raghuvar Dayal JJ)

15.02.1961

JUDGMENT

SUBBA RAO, J. -

These two appeals are directed against the judgment of the High Court of Judicature at Allahabad dismissing the appeal preferred by the appellants and maintaining the convictions and sentences imposed on them by the learned Sessions Judge Meerut, under s. 147, s. 424, s. 452, s. 325, read with s. 149, and s. 323, read with s. 149, of the Indian Penal Code.

Briefly stated the case of the prosecution is as follows : One Har Narain had obtained a decree from the court of the Additional Munsif, Ghaziabad, against the one Sunehri Jogi for a sum of money. In execution of that decree the Munsif issued a warrant for the attachment of the judgment-debtor's property. The amin to whom the said warrant was entrusted attached, inter alia, three buffaloes and two cows, which were in the house of the judgment-debtor, as his property. The amin kept the cattle in the custody of one Chhajju, the sapurdar. As the said sapurdar had no accommodation in his house for keeping the animals, he kept them for the night in the enclosure of the decree-holder with his permission. The next day at about 7 a.m., the nine appellants, armed with lathies, went to the enclosure of the decree-holder and began to untie two of the attached buffaloes. The decree-holder, his son and his nephew protested against the acts of the appellants whereupon the appellants struck the three inmates of the house with lathies, and when P.W. 4 intervened, they struck him also with lathies. Thereafter, appellants 1, 2 and 3 took away the two buffaloes followed by the other appellants.

The defence version is that on June 1, 1955, at about 7 a.m. the first appellant, Tika, was taking his two buffaloes for grazing when Har Narain and 11 others came with the amin and forcibly snatched the said buffaloes, that when Tika objected to it, those 12 persons assaulted him with lathies, that when appellant 2, Raja Ram, came there, he was also assaulted, and that Tika and Raja Ram used their lathies in self-defence.

The learned Sessions Judge, on a consideration of the evidence, held that the cattle were attached on the evening of May 31, 1955, and that, after their seizure, they were kept in the house of Har Narain. The Sessions Judge disbelieved the defence version that the accused gave the beating to Har Narain and others at 11 a.m. on June 1, 1955 in self-defence. On that finding, he convicted the accused as aforesaid. On appeal, the learned Judges of the High Court accepted the finding arrived at by the learned Sessions Judge and confirmed the convictions and the sentences passed by him on the accused, but directed the various sentences to run concurrently. Hence the appellants have preferred these two appeals against the Judgment of the High Court.

Learned counsel for the appellants raised before us the following contentions : (1) The attachment of the buffaloes was illegal and, therefore, the appellants in taking away their own buffaloes from the possession of the decree-holder did not commit any offence under s. 424 of the Indian Penal Code. (2) Even if the attachment was valid, neither the amin had any authority to keep the attached buffaloes in the custody of the sapurdar, nor the sapurdar had any power to keep them in the custody of the decree-holder, and therefore the decree-holder's possession was illegal and the appellants in taking away the buffaloes did not commit any offence within the meaning of s. 424 of the Indian Penal Code. (3) The appellants also did not commit any offence under s. 441 of the Indian Penal Code, as they had no intention to commit an offence or cause annoyance to the decree-holder, but they entered the house of the decree-holder only to recover their buffaloes from illegal custody. (4) The appellants did not commit an offence under s. 325, read with ss. 147 and 149, of the Indian Penal Code, as their common object was not to cause grievous hurt to the decree-holder and others, but was only to recover their buffaloes illegally detained by the decree-holder.

The first two contentions may be considered together. The material facts relevant to the said contentions may be stated. Har Narain in execution of his decree against Sunehri Jogi attached the buffaloes that were in the house of the judgment-debtor. Tika, appellant 1, filed a claim-petition - it is common case that subsequent to the incident his claim-petition was allowed. In the claim-petition, the High Court pointed out that Tika did not question the validity of the attachment but only set up his title to the buffaloes. Indeed, his defence in the criminal case also was not that the incident happened when the attached buffaloes were in the house of the decree-holder but that the incident took place before the attachment was effected. Before the Sessions Judge no point was taken on the basis of the illegality of the attachment. For the first time in the High Court a point was sought to be made on the ground of the illegality of the attachment, but the learned Judges rejected the contention not only on the ground that official acts could be presumed to have been done correctly but also for the reason that the appellants did not question the legality of the attachment in the claim-petition. That apart, P.W. 1, the amin, was examined before the Sessions Judge. He deposed that he had attached the heads of cattle from the house of the judgment-debtor, Sunehri Jogi, and that he had prepared the attachment list. He further deposed that the warrant of attachment received by him was with him. A perusal of the cross-examination of this witness discloses that no question was put to him in regard to any defects either in the warrant of attachment or in the manner of effecting the attachment. In these circumstances, we must proceed on the assumption that the attachment had been validly made in strict compliance with all the requirements of law.

If so, the next question is, what is the effect of a valid attachment of moveables ? Order XXI, rule 43, of the Code of Civil Procedure describes the mode of attachment of moveable properties other than agricultural produce in the possession of the judgment-debtor. It says that the attachment of such properties shall be made by the actual seizure, and the attaching officer shall keep the attached property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof. The relevant rule framed by the Allahabad High Court is r. 116, which reads,

> "Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some land-holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the court."

The aforesaid rule also empowers the attaching officer to keep the animals attached in the custody

of a sapurdar or any other respectable person. Attachment by actual seizure involves a change of possession from the judgment-debtor to the court; and the rule deals only with the liability of the attaching officer to the court. Whether the amin keeps the buffaloes in his custody or entrusts them to a sapurdar, the possession of the amin or the sapurdar is in law the possession of the court and, so long as the attachment is not raised, the possession of the court continues to subsist. Would it make any difference in the legal position if the sapurdar, for convenience or out of necessity, keeps the said animals with a responsible third party ? In law the said third party would be a bailee of the sapurdar. Would it make any difference in law when the bailee happens to be the decree-holder ? Obviously it cannot, for the decree-holder's custody is not in his capacity as decree-holder but only as the bailee of the sapurdar. We, therefore, hold that the decree-holder's possession of the buffaloes in the present case was only as a bailee of the sapurdar.

But it is said that even on that assumption, appellant 1, being the owner of the buffaloes, was not guilty of an offence under s. 424 of the Indian Penal Code, as he could not have acted dishonestly in trying to retrieve his buffaloes as their owner from the custody of the court's officer or his bailee. This argument turns upon the provisions of s. 424 of the Indian Penal Code. The material part of s. 424 of the said Code reads :

> "Whoever dishonestly or fraudulently removes any property of himself or any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

The necessary condition for the application of this section is that the removal should have been made dishonesty or fraudulently. Under s. 24 of the Indian Penal Code, "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing 'dishonestly'." Section 23 defines "wrongful gain" and "wrongful loss". "Wrongful gain" is defined as gain by unlawful means of property to which the person gaining is not legally entitled; and "wrongful loss" is the loss by unlawful means of property to which the person losing is legally entitled. Would the owner of a thing in court's custody have the intention of causing wrongful gain or wrongful loss within the meaning of s. 23 of the Indian Penal Code ? When an attachment is made, the legal possession of a thing attached vests in the court. So ling as the attachment lasts or the claim of a person for the thing attached is not allowed, that person is not legally entitled to get possession of the thing attached. If he unlawfully takes possession of that property to which he is not entitled he would be making a wrongful gain within the meaning of that section. So too, till the attachment lasts the court or it officers are legally entitled to be in possession of the thing attached. If the owner removes it by unlawful means, he is certainly causing wrongful loss to the court or its officers, as the case may be, within the meaning of the words "wrongful loss". In the present case when the owner of the buffaloes removed them unlawfully from the possession of the decree-holder, the bailee of the sapurdar, he definitely caused wrongful gain to himself and wrongful loss to the court. In this view, we must hold that appellant 1 dishonestly removed the buffaloes within the meaning of s. 424 of the Indian Penal Code and, therefore, he was guilty under that section.

Now we shall proceed to consider some of the decisions cited at the Bar in support of the contention that under no circumstances the owner of a thing would be guilty of an offence under s. 424 of the Indian Penal Code, if he removed it from an officer of a court, even if he was possession of it under a legal attachment.

Reliance is placed upon the decision of the Court of Criminal Appeal in Rex. v. Thomas Knight

[(1908) 25 T.L.R. 87.] where a prisoner, the owner of the fowls, took them away from the possession of the Sheriff's officer, the court held that the prisoner was not guilty of larceny. "Larceny is the wilful and wrongful taking away of the goods of another against his consent and with intent to deprive him permanently of his property". There are essential differences between the concept of larceny and that of theft; one of them being that under larceny the stolen property must be the property of someone whereas under theft it must be in the possession of someone. It would be inappropriate to apply the decision relating to larceny to an offence constituting theft or dishonest or fraudulent removal of property under the Indian Penal Code, for the ingredients of the offences are different. In Sarsar Singh v. Emperor [(1934) 35 Cr.L.J. 1307.], Bajpai, J., held that "the mere fact that the judgment-debtor, who is entitled to remove his crops which are not validly attached, has removed them does not prove that he has done so dishonestly". There the attachment was made in derogation of the provisions of Order XXI, rule 44, Civil Procedure Code; and the Court held that the attachment was illegal and, therefore, the property would not pass from the judgment-debtor to the court. It further held that under such circumstances the court could not presume that the act of removal was done dishonestly within the meaning of s. 24, I.P.C. This decision does not help the appellants, as in the present case the attachment was legal. Sen, J., in Emperor v. Ghasi [(1930) I.L.R. 52 All. 214.] went to the extent of holding that the owner cutting and removing a portion of the crops under attachment in execution of a decree and in the custody of a shehna did not constitute an offence under s. 424, I.P.C. The learned Judge observed at p. 216,

> "If they were the owners of the crop and removed the same, their conduct was neither dishonest nor fraudulent".

The learned Judge ignored the circumstance that the attachment of the crops had the legal effect of putting them in the possession of the court. For the reason given by us earlier, we must hold that the case was wrongly decided. In Emperor v. Gurdial [(1933) I.L.R. 55 All. 119.] Pullan, J., held that the owner by removing the attached property from the possession of the custodian and taking it into his own use, did not commit an offence under s. 424, I.P.C. But in that case also the attachment was illegal.

But there is a current of judicial opinion holding that where there was a legal attachment, a third party claiming to be the owner of the moveables attached would be guilty of an offence under s. 424 or s. 379, I.P.C., as the case may be, if he removed them from the possession of the court or its agent.

Where a revenue court had attached certain plots and certain persons were appointed as custodians of the crop standing on the plots and accused cut and removed the crop in spite of knowledge of the promulgation of the order of attachment, the Allahabad High Court held in Dalganjan v. State [A.I.R. 1956 All. 630.] that the removal of the crop by the accused was dishonest and that the conviction of the accused under s. 379, I.P.C. was proper. The learned Judges said, "Since the possession passed from the accused to the custodians, the cutting of the crop by the accused in March 1951 was dishonest." In State v. Rama [(1956) I.L.R. 6 Raj. 772.] the Rajasthan High Court held that where a person takes away the attached property from the possession of the sapurdar, to whom it is entrusted, without his consent, and with the knowledge that the property has been attached by the order of a court, he will be guilty of committing theft, even though he happens to be the owner of the property. Though this was a case under s. 379, I.P.C., the learned Judges considered the scope of the word "dishonestly" in s. 378, which is also one of the ingredients of the offence under s. 424, I.P.C. Wanchoo, C.J. observed at p. 775 thus :

> "There is no doubt that loss of property was caused to Daulatram inasmuch as he was made to lose the animals. There is also no doubt that Daulatram was legally entitled to keep the animals in his possession as they were entrusted to him. The only question is whether this loss was caused to Daulatram by unlawful means. It is to our mind obvious that the loss in this case was caused by unlawful means because it can never be lawful for a person, even if he is the owner of an animal, to take it away after attachment from the person to whom it is entrusted without recourse to the court under whose order the attachment has been made."

These observations apply with equal force to the present case. A division bench of the Allahabad High Court in Emperor v. Kamla Pat [(1926) I.L.R. 48 All. 368.] considered the meaning of the word "dishonestly" in the context of a theft of property from the possession of a receiver. Sulaiman, J., observed at p. 372 thus :

> "Therefore when a property has been attached under an order an of a civil court in execution of a decree, possession has legally passed to the court. Any person who takes possession of that property subsequent to that attachment would obviously be guilty under section 379 of the Indian Penal Code, if he knew that the property had been attached and was therefore necessarily acting dishonestly."

We need not multiply decisions, as the legal position is clear, and it may be stated as follows : Where a property has been legally attached by a court, the possession of the same passes from the owner to the court or its agent. In that situation, the owner of the said property cannot take the law into his own hands, but can file a claim-petition to enforce his right. If he resorts to force to get back his property, he acts unlawfully and by taking the property from the legal possession of the court or its agent, he is causing wrongful loss to the court. As long as the attachment is subsisting, he is not entitled to the possession of the property, and by taking that property by unlawful means he is causing wrongful gain to himself. We are, therefore, of the view that the appellants in unlawfully taking away the cattle from the possession of the decree-holder, who is only a bailee of the sapurdar, have caused wrongful loss to him and therefore they are guilty of an offence under s. 424, I.P.C.

The next contention turns upon the provisions of s. 441 of the Indian Penal Code. The argument is that the appellants did not commit trespass with intention to commit an offence or intimidate, insult or annoy any person in possession of such property. A distinction is made between intention and knowledge. It is said that the appellants did not trespass into the house of the decree-holder with any such intention as mentioned in that section. But in this case we have no doubt, on the evidence, that the appellants entered the house of the decree-holder with intent to remove the attached cattle constituting an offence under s. 424 of the Indian Penal Code. The appellants are, therefore, guilty of the offence and have been rightly convicted under s. 441 of the Indian Penal Code.

The last contention is that the principal object of the accused was to get back their cattle which had been illegally attached and that their subsidiary object was to use force, if obstructed, and that in the absence of a specific charge in respect of the use of force the accused should not have been convicted of what took place in furtherance of the subsidiary object. The relevant charge reads thus :

> "That you, on or about the same day at about the same time and place voluntarily caused such injuries on the persons of Om Prakash, Har Narain, Jhandu and Qabul, that if the injuries would have caused the death of Har Narain, you would have been guilty of murder and thereby committed an offence under section 307 read with

section 149 I.P.C. and within the cognizance of the court of Sessions."

Though s. 149 of the Indian Penal Code is mentioned in the charge, it is not expressly stated therein that the members of the assembly knew that an offence under s. 325 of the Indian Penal Code was likely to be committed in prosecution of the common object of that assembly. Under s. 537 of the Code of Criminal Procedure, no sentence passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the charge, unless such error, omission or irregularity has in fact occasioned a failure of justice. The question, therefore, is whether the aforesaid defect in the charge has in fact occasioned a failure of justice. The accused knew from the beginning the case they had to meet. The prosecution adduced evidence to prove that the accused armed themselves with lathies and entered the premises of the decree-holder to recover their cattle and gave lathi blows to the inmates of the house causing thereby serious injuries to them. Accused had ample opportunity to meet that case. Both the courts below accepted the evidence and convicted the accused under s. 325, read with s. 149, I.P.C. The evidence leaves no room to doubt that the accused had knowledge that grievous hurt was likely to be caused to the inmates of the decree-holder's house in prosecution of their common object, namely, to recover their cattle. We are of the opinion that there is no failure of justice in this case and that no case has been made out for interference.

No other point was raised before us. In the result, the appeals fail and are dismissed.

Appeals dismissed.

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