Dominion of India, New Delhi v. Firm Brij and Co.

Kapur, J.

(5) The Railway can dispose of the goods consigned under section 56 of the Railways Act but subject to this section their liability as a bailee is not terminated because of the laches of the consignors.

(6) In this particular case the liability of the Railway is not excluded.

(7) No interest is allowable on the amount of money awarded as compensation.

The decree will, therefore, be modified to the extent indicated above i.e., reduced to Rs 12,294-3-3. The plaintiff will have his proportionate costs in this Court and the Court below.

SONI, J.—I agree.

REVISIONAL CRIMINAL.

Before Khosla and Soni, JJ.

AJAIB SINGH ETC.,—*Convicts-Petitioners.*

1952

versus

October, 11th

THE STATE,—*Respondent.*

Criminal Revision No. 651 of 1951.

Code of Criminal Procedure (Act V of 1898)—Section 439—Competency of revision when appeal provided and not filed—Procedural irregularity—Whether entitles the aggrieved party to file a revision instead of an appeal.

The police seized four horses and some *tilla* as unclaimed property but did not report the seizure to the magistrate as required by Section 523 of the Code of Criminal Procedure. Six days later the petitioner made applications to the magistrate claiming the entire property and for an order that the police may be directed to deliver the seized property to them. The Magistrate gave them an opportunity to substantiate their claims and after recording the evidence the magistrate passed an order that the petitioners had failed to prove that the seized property belonged to them and that it should be forfeited to the Government under Section 524 of the Code. The magistrate, before passing the order, did not issue any proclamation. The petitioners did not file an appeal

against the order of forfeiture but filed a revision in the High Court. Objection was taken that the revision was not competent as an appeal had been provided by Section 524(2) of the Code.

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Held, that in this case it would be improper to entertain a revision petition as the petitioners were entitled to file an appeal against the order under revision and they did not choose to do so.

Held further, that the issue of proclamation in this case was not necessary and, therefore, the omission to issue the proclamation was not an irregularity and even if it were so, the legality of the final order could be questioned in an appeal. Procedural irregularity does not entitle the aggrieved party to file a revision petition instead of an appeal.

This case was referred by Mr. Justice Soni, on 9th June, 1952, to Division Bench consisting of Mr Justice Khosla, and Mr Justice Soni, for decision.

Petition under Section 439 of Criminal Procedure Code, for revision of the order of Sardar Sube Singh, Magistrate, 1st Class, Patti, dated the 28th May, 1951, convicting the petitioners.

AMAR NATH GROVER, for Petitioners.

YASHPAL GANDHI, for Respondent.

ORDER.

SONI, J. Gharyala is a village near the Indo-Pakistan border which is about seven miles away from the village. On the 9th March 1951, the Deputy Superintendent of Police of Patti carried out a raid on information received by him that some persons were smuggling goods out of India into Pakistan and in return getting goods smuggled from there. When the raiding party reached Harnam Singh's house they found four horses tethered in a deserted place near the house. It is said by the Magistrate in his order that the Deputy Superintendent of Police stated before him that the Muslims from Pakistan who had come to take *tilla* away had disappeared and could not be traced. The *tilla* was lying near the gate of Gurbachan Singh's house. It was packed in 'Khurjis' and was to be loaded on horseback. At

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that time neither Harnam Singh, nor Ajaib Singh, nor Gurbachan Singh, nor Hira Singh was present. Nobody claimed either the horses or the *tilla*. The Deputy Superintendent of Police took all the horses and the *tilla* into possession as unclaimed property. Though this property was taken into possession by the Deputy Superintendent of Police, no report was made to any Magistrate. On the 15th March, 1951, the four persons above-mentioned, namely, Harnam Singh, Ajaib Singh, Gurbachan Singh and Hira Singh, put before the Magistrate five separate applications claiming the four horses and the *tilla* and asking that they be returned to them. These applications were forwarded by the Magistrate to the police for report. Thereupon the police made a report. The police was asked to give proof in support of their case. The police produced four witnesses and the claimants produced five. After considering the evidence of these witnesses the Magistrate came to the conclusion that the claims of the applicants were unfounded. He held that there was no market or shop at village Gharyala for *tilla* and the large quantity of *tilla* that was found (mentioned in the application for return as weighing 1 maund 28 seers 11 chhatanks) could not have been kept except for smuggling purposes. The next question that the Magistrate considered was as to who brought it there. On that point he believed the evidence of the Deputy Superintendent of Police who said that there were some Muslims who were to come on horses to take the *tilla* away. He was influenced by the fact that the claimants had taken as many as five or six days to claim the horses and the *tilla* which showed to him that they were not genuine claimants. The horses were never wanted to be taken into possession by the claimants for all these days, though they were said to be constantly required by them in their applications. Considering all the circumstances the Magistrate came to the conclusion that the horses and the *tilla* belonged to Muslims who intended to smuggle the *tilla* away on the horses and who had disappeared on coming to know of the police raiding party and that the claimants were not genuine claimants but were merely

taking advantage of a chance of getting property lying unclaimed. He concluded his order in these words :—

> "Therefore, the property in question is unclaimed and must be forfeited to the Government. Accordingly, it is ordered that the four horses and the *tilla* in question are forfeited and shall be auctioned in due course and the amount to be deposited in the Government Treasury. But the forfeited articles, i.e., the horses and *tilla* are to remain as they are till the time for appeal against this order has expired."

The heading of this order is an order under section 523, Criminal Procedure Code, and the Magistrate made this order on the 28th May, 1951. There was no appeal taken from this order. What happened was that a joint petition for revision of this order by the four claimants before the Magistrate was put in this Court on the 25th of June 1951. Thereupon a learned Judge of this Court on the next day, i.e., 26th of June, admitted it and ordered the sale to be stayed and the custody of the animals to be made over to the petitioners on their furnishing security to the satisfaction of the District Magistrate.

When the case came up for hearing before me objection was raised that no revision lay as an appeal was provided under the provisions of clause (2) of section 524 of the Code of Criminal Procedure. This point was not present to Mr Grover counsel for petitioners when he put in this petition. He asked for an adjournment and an adjournment was granted so that he may come prepared on this point. I have heard learned counsel on both sides.

Mr Grover submitted that this order was an order under section 523 as mentioned in the heading by the Magistrate, that it was not to be considered as made under section 524, even though

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the Magistrate in the concluding portion of his order states that the horses and the *tilla* are forfeited, but nothing is to be done till the time for appeal against his order has expired, that there was in reality no appeal provided under the law from this order, and that as no appeal was provided a revision lay. In revision the prayer made was that the order should be set aside and that the horses and *tilla* should be handed over to the petitioners. At the time of arguments Mr Grover contented himself by saying that the only order which he could ask this Court to make was that the order of the Magistrate ordering the horses and the *tilla* to be forfeited to Government be set aside and that he be directed to issue a proclamation under the provisions of clause (2) of section 523. Mr Grover's argument is that before forfeiture can be ordered there are two distinct steps contemplated by the Code of Criminal Procedure. The first step is the step mentioned in section 523 which terminates with a proclamation to be issued by the Magistrate. The second step is the step in which the Magistrate may make an order of forfeiture but that order can only be made after proclamation has been issued. Sections 523 and 524 read as follows :—

> "S. 523. The seizure by any police officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who 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, or, if such person cannot be ascertained, respecting the custody and production of such property.
>
> (2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions

(if any) as the Magistrate thinks fit.. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

S. 524 (1). If no person within such period establishes his claim to such property, and if the person in whose possession such property was found, is unable to show that it was legally acquired by him, such property shall be at the disposal of the Provincial Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, or of a Magistrate of the first class empowered by the Provincial Government in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie."

Mr Grover's argument is that acting on circumstances which created suspicion of the commission of an offence the police got hold of the horses and of the *tilla*. This fact they should have immediately reported to the Magistrate under the provisions of clause (1) of section 523. The police did not do so. If they had forthwith made a report the Magistrate could have made an order regarding the disposal of the property or the delivery of the property to the person entitled to the possession thereof, or if such person could not be ascertained, regarding the custody of the property. Though the police made default in not immediately reporting the matter, the petitioners

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having come to know that their horses and *tilla* had been taken hold of by the police, approached the Magistrate with their applications under section 523 and asked the Magistrate to deliver the property to them. Mr Grover says that under these circumstances the provisions of clause (2) of section 523 come into operation. According to him the petitioners were the persons who were entitled to the property and Magistrate should have ordered the property to be delivered to them on such conditions, if any, as the Magistrate thought fit. In order to prove that they were entitled to the property the Magistrate was perfectly competent to ask them to adduce proof of their being so entitled. On proof being furnished the Magistrate could either be satisfied with the proof or not be satisfied with it. If he was satisfied the person entitled would be known to the Magistrate and he would deliver the property to him on such conditions as he thought fit. If he was not satisfied the result would be that the person entitled would not be known to the Magistrate and on that finding the Magistrate could under the provisions of clause (2) of section 523 detain the property. He must thereafter according to the provisions of that clause issue a proclamation specifying the articles of which such property consisted and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation. Mr Grover's argument is that the Magistrate acted under the provisions of section 523, that acting under those provisions he came to the conclusion that the applicants were not the persons entitled to the property and that consequently it was imperative on the Magistrate to have issued the proclamation. It is only after the proclamation has been issued that people come forward with their claims within six months of the proclamation as this is what is provided under section 524. Under clause (1) of this section if no person within the six months establishes his claim to the property and if the person in whose possession such property was found is unable to show that it was legally acquired by him, then

such property can be ordered to be at the disposal of Government and may be sold under the orders of the Magistrate. Mr Grover's argument is that the Magistrate overlooked the provisions of section 523 and in doing so acted in a manner which has caused prejudice to the petitioners because it has deprived them of their right to agitate the matter before the Magistrate within six months from the date of the proclamation. If an order is made under the provisions of clause (1) of section 524 then an appeal lies under the provisions of clause (2) of that section. Mr Grover's argument is that no order was made under the provisions of section 524 but the order was one made under the provisions of section 523 from which no appeal is provided and therefore a revision is competent as the Magistrate exercised jurisdiction not vested in him under the provisions of that section.

Learned counsel for the State submits that the object of the proclamation is to give persons affected an opportunity to bring forward their claim and for the Magistrate to adjudicate upon those claims. In the present case the non-making of a proclamation has caused no prejudice whatever. If a proclamation had been issued the persons who wanted to claim this property would have come forward within six months and claimed the property before the Magistrate. Here the four petitioners alleged themselves to be the owners entitled to the property. They approached the Magistrate. The Magistrate gave them every opportunity to produce their evidence. He had their evidence as well as the evidence produced by the police before him and he came to a certain conclusion. That conclusion was against the applicants but that conclusion was based on consideration of evidence of both sides and after giving them, all opportunities, and if the Magistrate came to a conclusion which the petitioners thought was wrong the remedy was by way of an appeal under the provisions of clause (2) of section 524. Procedure is nothing but the machinery of the law and the object of all procedure is to afford

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reasonable opportunity to a claimant to put forward his case before the deciding authority. Instead of putting forward the case six months later if the case is put forward six months earlier there is no prejudice caused if all opportunity to establish the claim is afforded.

It appears to me that section 523 is procedural where the Magistrate does not admit the claim. If the Magistrate admits the claim he hands over the property to the claimant subject to any conditions that he may impose. If he does not admit the claim then he issues a proclamation. But there is nothing in law to prevent an owner coming forward to a Magistrate and to ask for the return of his property to him before any proclamation is issued. If no proclamation is issued, the persons, who have not put forward their claims before a Magistrate and which the Magistrate has not properly adjudicated upon, may have a grievance. But can it be urged that the persons who have already come forward to the Magistrate before any proclamation is issued have been prejudiced if the Magistrate has given them all facilities to put their case before him ? It appears to me that it is difficult to say that they have been prejudiced. It is not imperative in law to wait for a proclamation to issue. Mr Grover's argument is that if the petitioners had not been able to convince the Magistrate of their claim the law gave the Magistrate no option but to issue a proclamation. It is only after the proclamation was made that the order of forfeiture can be passed. But how would it help the petitioners ? Because if they came before the Magistrate after the proclamation had been made and made a claim before him, they would be met by the plea that the Magistrate had already dealt with their claim and by redealing with the same matter he would be reviewing his order, which he as a criminal Court cannot do. The final order no doubt that is to be made is either to deliver the property to a claimant or to forfeit it to Government. If the Magistrate does not issue the proclamation and short-circuits the procedure by passing an order under section 524 he may be

acting irregularly. This irregularity, however, does not affect the claimants who have already come before him. Under section 523 the questions to be decided relate to mere possession and custody. Under section 524 the question of title is decided. The procedure prescribed in section 523 does not prejudicially affect persons who have already appeared before the Magistrate and have had their title inquired into and decided. If one looks at the language of the applications put in by the present petitioners one can come to no other conclusion but that they were inviting the Magistrate to examine their titles and return the horses and *tilla* to them. The applications regarding three of the horses are in identical terms. The application regarding the fourth horse differs from the others only in giving the facts how the claimant came to acquire the horse and became its owner, the other three applications stating the horses to be the claimants' own as home bred. In all these applications claim is made as owner, title is pleaded and return of the horses prayed for. In the application regarding the *tilla* we find the same thing. That application runs as follows :—

> "Application for the return of lace weighing 1 Maund 28 Seers and 11 Chhataks with labels, belonging to the applicant, from the possession of Patti Police, District Amritsar.
>
> The applicant begs to state as under :—
>
> 1. About 6/7 days back, Patti Police, District Amritsar, took into its own possession lace weighing 1 Maund 28 Seers 11 Chhataks with labels belonging to the applicant. It is still in possession of Patti Police.
>
> 2. The aforesaid lace belongs to the applicant. The applicant had purchased it for business purposes. Receipt in respect of purchase thereof is with the petitioner.

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3. The aforesaid lace is not a stolen property, nor is it required by the Police in any case, nor yet is there any case in respect of the said lace. Therefore, the applicant is entitled to get the lace back.

4. Hence, it is prayed that the aforesaid lace may be got returned to the petitioner."

The Magistrate treated these applications as the petitioners wanted them to be treated, gave them opportunity to lead their evidence regarding their title and ownership and passed his order repelling their contentions. The language of the concluding portion of the Magistrate's order is clearly the language employed when passing an order under the provisions of clause (1) of section 524. An appeal is provided therefrom under clause (2) of the section. An appeal if provided by law lies from what a Court or a Magistrate actually does do. If the remedy by way of appeal is not availed of, no revision lies.

This is a case of first impression. No authority directly bearing on the point involved in the case was cited before me. The point is in my opinion of general occurrence and of sufficient importance from the point of the proper procedure to be adopted in such cases. The property involved in the present case is, I am told, of considerable value. I, therefore, acting on the proviso to Rule 1 of Part B of Chapter 3B of Volume V of the High Court Rules and Orders refer the case for decision to a Division Bench.

Khosla, J.

KHOSLA, J.—This case was referred to this Bench by my brother Soni for a consideration of the point whether a revision petition is competent in the circumstances.

The facts briefly are that on the 9th of March, 1951, a Police party patrolling the area near the Indian border in Amritsar District took into possession a quantity of *tilla* (gold lace) and four horses from a deserted place near a house. The

Police party suspected that the gold lace had been collected at this place with the object of its being smuggled out to Pakistan and the horses were intended for the persons who were to smuggle the gold lace to Pakistan. Nobody at the moment claimed the horses or the gold lace and they were kept by the Police as unclaimed property. On the 15th of March four persons, who are the petitioners before us, made five different applications to a Magistrate at Amritsar claiming that the gold lace and the horses belonged to them and praying for the restoration of these things. The Magistrate called for a report from the Police and took evidence in support of the claim made by the petitioners. The Police were also allowed to produce witnesses. After considering the evidence produced by both parties the Magistrate came to the conclusion that the claim of the petitioners had not been substantiated. He, therefore, ordered that the horses and the gold lace should be forfeited to Government. The concluding portion of his order reads as follows :—

> "Therefore, the property in question is unclaimed and must be forfeited to the Government. Accordingly it is ordered that the four horses and the "Tilla" in question are forfeited and shall be auctioned in due course and the amount to be deposited in the Government Treasury. But the forfeited articles, i.e., the horses and 'Tilla', are to remain as they are till the time for appeal against this order has expired."

No appeal was preferred against this order by the petitioners who were obviously the aggrieved parties, but a revision petition was presented directly to this Court, and the question at once arose whether in view of the wording of section 524, Criminal Procedure Code, which provides for an appeal, a revision petition lies directly to this Court.

Mr. Grover, who appeared on behalf of the petitioners, contended that the order of the trial

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Magistrate was not an order under section 524, Criminal Procedure Code, but an order under section 523, and as orders under section 523 were not appealable, the only way in which their correctness could be challenged was by way of revision. Another argument raised by him was that the Magistrate had been guilty of a material irregularity of procedure and that therefore even though an appeal lay against the final order a revision petition was competent in order to set right the procedural irregularity.

Under section 523 any property which is "found under circumstances which create suspicion of the commission of an offence" may be seized by a Police officer and the seizure reported to a Magistrate. Thereupon the Magistrate may make such order as he thinks fit respecting the disposal of such property. If no one entitled to the possession of the property can be found the Magistrate may pass an order respecting the custody and production of the property. But if such a person is known the Magistrate may order the property to be delivered to him. When the person entitled to its possession is not known the Magistrate is required to issue a proclamation requiring any person who may have a claim to the property to appear before him and establish his claim within six months. If he succeeds in establishing his claim the property is to be handed over to him, but if within the period of six months no one appears or can establish his claim the Magistrate is required under section 524 to order its forfeiture. Such property may be sold and the proceeds credited to Government. An order of this type is appealable under section 524 (2). Therefore under sections 523 and 524 when any property is found by the Police in circumstances which give rise to a suspicion that an offence has been or is about to be committed the following procedure is to be adopted—

(1) Seizure of the property by the Police.

(2) Report to a Magistrate.

If the Magistrate knows of any one who is entitled to the possession of the property he may award it to him. If he does not, he must (3) issue a proclamation under subsection 2 of section 523, and within six months of the proclamation any person claiming the property can come forward and claim it. If no one claims it, or if the person claiming it is unable to prove his claim, the Magistrate will (4) order the property to be forfeited to Government.

The contention of Mr. Grover is that since the Magistrate did not issue a proclamation his order forfeiting the property to Government was illegal. It is, however, clear that the object of sections 523 and 524 is to give an opportunity to a claimant to appear before a Magistrate and prove his claim. A proclamation is necessary only where no one comes forward to claim the property or the Magistrate does not know the identity of the claimant. Where a person comes forward of his own accord and makes a claim to the property seized by the Police no question of a proclamation can arise, and in such cases a stranger to the proceedings, who has not come forward to make a claim, may have a grievance. In the present case the aggrieved parties are the petitioners who did actually appear before the Magistrate and tried to prove their claim. They cannot say that the omission to issue a proclamation has in any way injured them or prejudiced their case. The sole object of issuing a proclamation is to inform possible claimants of the seizure of the property. Where the seizure is actually known to the persons who claim the possession of the property and who actually come forward to substantiate their claim no proclamation is necessary. Under section 523 the only order which a Magistrate can pass is an order dealing with the temporary custody of the property or an order handing over possession to the rightful claimants. No order forfeiting seized property to Government can be passed except under section 524 which comes into play

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only after the claimants have failed to substantiate their claim, or if no claimants at all have come forward. Therefore it is clear that the order of forfeiture passed in this case was an order passed under section 524, Criminal Procedure Code, and against this order an appeal lay. The petitioners did not choose to appeal and in the circumstances it will be improper to entertain a revision petition.

With regard to the argument of Mr Grover that the non-issue of a proclamation is an irregularity which can be agitated in a revision petition, the answer must be that the omission to issue a proclamation was not in this case an irregularity, and even if it were so the legality of the final order can be questioned in an appeal and so procedural irregularity does not entitle the aggrieved party to file a revision petition instead of an appeal. I am therefore of the view that in the present case it would be improper to entertain a revision petition, as the petitioners were entitled to file an appeal against the order under revision.

This revision petition must therefore be dismissed and I would dismiss it.

Soni, J.

SONI, J.—I agree.