

Hameed Khan Vs. State

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Court : Allahabad

Decided On : Sep-24-1956

Reported in : AIR1957All121; 1957CriLJ169

Judge : Kidwai and ;Randhir Singh, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 4(1), 87, 88, 88(6), 435 and 439

Appeal No. : Criminal Ref. No. 41 of 1955

Appellant : Hameed Khan

Respondent : State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : Party in person

Judgement :

Randhir Singh, J.

1. This is a reference made by the learned Additional Sessions Judge of Lucknow. Originally it came up for hearing before a learned single Judge of this Court, He was of opinion that this reference should be placed before a Divisional Bench as the authorities were not all uniform. This has therefore, come up before us,

2. It appears that one Ishtiaq had absconded while he was on bail and proceedings under Sections 87 and 88, Criminal P. C. were ordered to be taken against him. Some moveable property was attached. One Hamid Khan made a claim before the Magistrate who was seized of the case that the property which had been attached belonged to him and his family and that Ishtiaq was not the owner of the property.

The learned Magistrate who heard the claim, however, rejected it. The applicant then went up in revision to the Sessions Judge. The learned Sessions Judge was of the opinion that there was no evidence in support of the contention that the property belonged to Ishtiaq while there was evidence in support of the claim made by Hamid. Under these circumstances the claim, of Hamid should have been allowed and the learned Magistrate had erred in rejecting his objection. On these grounds he referred the case to the High Court.

3. The learned Government Advocate has placed all the relevant case law on the point in issue before us. At one time it was held in some cases that an order made under Sections 87 and 88, Criminal P. C. could not be the subject of revision under Section 435, Criminal P.C. The first case cited before us is *Queen Empress v. Kanappa Goundan*, ILR 20 Mad 88 (A). The facts of this reported case were very much similar to the facts of the present case. An attachment had been made under Section 88 Criminal P. C. and the claim made by a certain other person was rejected.

The unsuccessful claimant then went up in revision and a reference made to the High Court. In a very short judgment the learned Judges rejected the reference. The Divisional Bench which decided the case, however, came to the conclusion, firstly, that the Magistrate had given good reasons in support of his order and secondly that they were disposed to agree with the view taken by some of the other High Courts of Section 88 of the Code of Criminal Procedure.

The controversy, it appears, before the Court was whether proceedings under Section 88 could be deemed to be proceedings of a Judicial nature which could be the subject of revision under Section 435, Criminal P. C. Before we dismiss the other cases it may be useful to indicate the changes which have since been made

in the Code of criminal Procedure.

4. The expression 'judicial proceeding' was not defined in the Code of 1861 and the definition of the words 'judicial proceeding' came for the first time in the Code of 1872. Certain changes were introduced in this definition in 1882, and the words 'judicial proceedings' were defined as follows:

'Judicial proceeding' means any proceeding in the course of which evidence is, or may be, legally taken.'

5. There was a further change in this definition in the Code of 1898 and the word 'means' was substituted by the word 'includes' and the words 'on oath' were added. The definition, as it emerged from the Code of 1898, is as follows:

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

We might now advert to Section 83, Criminal P. C. It appears that there was no specific provision for entertaining claims or objections to attachments made under Section 88 and Clauses (6A) to (6E) were added for the first time by means of the amendment made in 1923. These clauses detail the procedure to be followed in the case of claims or objections made to the property attached. The Court has to make an inquiry into the claim and may then either reject the claim or allow it.

This clearly shows that evidence may be taken by the Court. In view of this provision an inquiry into a claim under Section 88, Criminal P. C. would be covered by the expression 'judicial proceeding'. There can, therefore, be no doubt that in view of the provisions of Section 435 of the Code of Criminal Procedure, proceedings under Section 88 could be the subject of revision by the High Court.

6. Section 435 does not limit the exercise of jurisdiction to judicial proceedings only. Any proceeding before any inferior criminal Court can be the subject of revision. The earlier rulings, before the proceedings under Section 88 became 'judicial proceedings' in view of the amendment made in 1923 were also held to be subject to revision under Section 435, Criminal P. C., vide, *Ham Din v. Emperor*, 8 Cr LJ 260 (Lah) (B) and *Santa Singh v. Emperor*, AIR 1924 Lah 617 (C). We are,

therefore, clearly of opinion that proceedings of the nature which were [before the learned Magistrate could be revised by 'this Court under Section 435, Criminal P. C.

7. Coming to the merits of the reference, we find that Istiaq was one of five brothers residing in village Kasmandi Khurd. According to the allegations of the claimant Hamid, Ishtiaq had gone with his family to live with his father-in-law after separating from his other brothers and whatever small property fell to his share was taken away by him.

No evidence was adduced on behalf of the State in support of the contention that the property attached in Kasmandi Khurd belonged to Ishtiaq Hamid, on the other hand, adduced evidence in support of his contention that the property belonged to the other members of the family. It appears that there was some substance in the contention of Hamid that Ishtiaq had gone away to live with his father-in-law before the attachment of the property was made at Kasmandi Khurd.

The Sub-Inspector made a report that Ishtiaq and his family had been living at Kakon with Rafiq and that quite a good amount of property belonging to Ishtiaq was there and that its attachment will be necessary in order to coerce Ishtiaq to surrender. This clearly shows that Ishtiaq with his family had begun to live with his father-in-law at Kakori. Moreover, the order of reference made by the Sessions Judge shows that the whole of the property in the house in which the brothers lived was attached.

There was no reason to believe that the whole of the property belonged to Ishtiaq and the State should have led some evidence to prove that the property belonged to Ishtiaq alone. In a case where no evidence has been produced, & the Court has found, In favour of the party which has produced no evidence, the evidence should be gone into even far an application for revision in order to find if the order passed was a proper order, in the present case we find that the learned Magistrate rejected the claim of Hamid on wholly insufficient grounds and the order passed by him should be revised.

8. Accordingly, we accept the reference and set aside the order passed by the Magistrate. The claim of Hamid is allowed and the property attached shall be released.

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