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Court : Allahabad

Decided On : Dec-11-1934

Reported in : AIR1935All490

Appellant : Tej Singh and ors.

Respondent : Emperor

Judgement :

ORDER

Bennet, J.

1. This is an application in criminal revision on behalf of three persons Tej Singh, who has been sentenced to Rs. 50 fine, and Wazira and Phul Chand, who have been sentenced to Rs. 15 fine and six months' rigorous imprisonment. The convictions are under Sections 147, 323 and 325, Penal Code. The latter two persons are servants of the mother of Rawat Raj Kumar. There was a civil suit in the Small Cause Court, Ghansbyam Singh v. Rawat Rajkumar filed on 12th August. On the same date an application was made for attachment before judgment under Order 38, Rule 5(3) and an order was issued that the attachment should be made by Pandit Ramnatb Nagar vakil. On 13th August, the vakil and the plaintiff proceeded to the house of the defendant to make the attachment. The Sessions Court has found that the Rawat is mother informed them that the attachable property was not in the zenana quarters. Attachment then was carried

on in the remainder of the house. This led to a quarrel and subsequently to an attack. The muharrir of the vakil was injured. The vakil returned to the thana and made a report. The Sub-Inspector and the tahsildar went to the Rawat's house and in the neighbourhood they found the plaintiff lying injured and the tahsildar took his statement and the Sub-Inspector began his enquiry. Four or five men were found injured. The complainant gave a list of 89 persons. Thirteen were prosecuted. The case was committed to Sessions. This Court quashed the committal order. Another Magistrate again committed it to Sessions. This Court set that order aside and the case was eventually completed by another Magistrate, and after various revisions, the appeal has been decided by the lower Court two years after the event. Four people were convicted by the Magistrate and one has been given the benefit of the doubt by the Sessions Court. There are thus three applicants in revision before this Court. The first ground of revision is that the appointment of a Commissioner for attachment was illegal and without jurisdiction. The attachment before judgment was made under Order 38, Rule 5 (3), and Rule 7 states that save as otherwise expressly provided the attachment shall be made in the manner provided for the attachment of property in execution of a decree, i.e., under Rule 43, Order 21. Rule 105, Order 21, provides that such attachment shall be made through a civil Court amin or bailiff unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the hand-writing of the presiding Judge himself in the order for attachment. In the present case the order of the Small Cause Court Judge did not give the reasons. Those reasons indeed are obvious because any one familiar with the procedure of civil Court knows that the civil Court amins and bailiffs have a programme drawn up of their duties for several weeks in advance as they have to conduct sales for which dates are fixed by the execution Courts. As the application required immediate attachment, it was clear that the Court could not secure an amin or bailiff to make the attachment and therefore the Court had to employ a vakil. Learned Counsel however alleges that owing to the omission to record reasons the procedure was illegal. The further argument to be derived from that is that the accused had a right of private defence, which has been found against them by the Sessions Court. Now Section 99, Penal Code, provides as follows:

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

2. I consider that in the present case the vakil was at the time a public servant acting in good faith under Colour of his office and the mere omission to record the reasons in the order appointing him has no bearing in this case and does not give rise to any right of private defence. No authority was shown by counsel for his proposition that the omission to record reasons would make the attachment illegal. There is, on the contrary, the authority of *Government of Assam v. Sahebulla* 1924 Cal. 1, where it was held that the omission of Magistrate to record separately the reasons for the issue of a warrant, under Section 90. Criminal P.C., does not make a warrant invalid and that the words 'after recording its reasons in writing' are not mandatory but directory. Similarly it appears to me that the provision in Order 21, Rule 105 for recording the reasons may be taken to be not mandatory but directory. The order therefore for the appointment of the vakil to make the attachment before judgment was a good order and the attachment was not illegal or without jurisdiction. That being so, no right of private defence arose for the accused persons. The second ground of revision deals with the same point.

3. The third ground alleges that the plaintiff and vakil were wrong in taking a large party of armed persons and that they were the aggressors, and the fourth ground alleges that this party acted illegally in forcing their entry into the private zenana deorhi of the mother of the Rawat who was living separately from her son, and in illegally seizing and removing property from her zenana exempt under the law from attachment and assaulting her female attendant in the zenana, and the fifth ground alleges that this amounted to house trespass and gave the applicant a right to act in self-defence, and the sixth ground is similar. As regards the allegations of fact in these grounds it has been found by the lower appellate Court that the party did not enter the zenana but that the vakil and the complainant went into the house and the Rawat's mother informed them that the attachable property was not in the zenana quarters and attachment was then carried out in the remainder of the house and it was attachment in the remainder of the house that

led to the attack. Learned Counsel endeavours to show that this finding of fact is wrong and he undertook to show this from the evidence for the prosecution. He referred to a passage in the evidence of the complainant that there was attachment of four beds and three lanterns that were put in the upper storey. He attempts to show that the whole upper story was zenana quarters, but he has failed to show this. I find no reason therefore to differ from the lower Court on the finding of fact.

4. The grounds of revision appear to me to assume that for an attachment there is no right to enter zenana quarters. In Section 62, Civil P.C., it is laid down that a person executing a process under the Code directing or authorizing the seizure of moveable property may enter a zenana, quarter if sufficient notice is given to the woman or women concerned to withdraw and reasonable facilities are allowed for the withdrawal of these women. Learned Counsel argues that this would not give a right to enter the zenana quarters in the occupation of the mother of the Rawat because as he says she is living separately from her son. I do not find that in Section 62(3) of the Code there is any limitation that the particular room in question must be in the occupancy of the judgment-debtor. Such a limitation is introduced into Sub-section (2) where there is provision for breaking open doors. But in Sub-section (3), which deals with entering parda quarters, there is no such limitation that the rooms should be in the occupancy of the judgment-debtor. The Code apparently contemplates that it is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in those rooms. The basis therefore of the argument in these grounds of revision is unsound. As regards the point that the mother is living separately from the son, a mere separation in residence does not amount to any partition in Hindu law, and there is nothing shown that there has been any partition of the son from the joint Hindu family from which the mother had a right of maintenance. No other ground of revision was argued. I consider that the finding of the Sessions Court was correct. The sentences are not 'excessive. The application in revision is dismissed. The accused who are on bail must surrender to their bail and must complete the rest of their sentences.

