

## Reg. v. Girdhar Dharamdas.

1869  
March 5.

*Conversion of property of deceased person—Indian Penal Code, Sec. 404—Report, Power of Sessions Judge to call for.*

Held, that Sec. 404 of the Indian Penal Code (relating to the misappropriation or conversion of "property" left by a deceased person) does not apply to immoveable property.

A Session Judge ought not to call for a report from the Magistrate of the District in any case in which it is not competent to such Sessions Judge to call for the record and proceedings, (e g) in the case of a person tried by a Subordinate Magistrate who has appealed to the District Magistrate.

In trial held by the Magistrate of the District or Magistrate F. P. in which the Sessions Judge can call for the record and proceedings as he has power also to call for a report.

This case was referred for the orders of the High Court by W. Sandwith, Acting Session Judge of Ahmedabad, under Sec. 434 of the Code of Criminal Procedure.

The facts of the case appear from the reference of the Sessions Judge:

"One Dana Vasji died intestate in February 1867 leaving a house and other property. This being reported by the Magisterial department to the District Court, the Nazar was directed to administer to the estate; and on the latter deputing his *karkun* to receive possession of the said house from the village authorities, it appeared that the petitioner, Girdhar, had taken possession, and refused to give up the house. Girdhar was thereupon charged by the Subordinate Magistrate of Daskrohi with dishonest misappropriation of property possessed by a deceased person at the time of his death under Sec. 404 of the Indian Penal Code, was convicted of the same, and sentenced to imprisonment and fine.

"On appeal, the Acting Magistrate of the District saw no reason to interfere with the Subordinate Magistrate's finding.

"Dissatisfied with this, Girdhar has petitioned this Court, under Sec. 434 of the Code of Criminal Procedure on the following grounds:—(1) that Sec. 404 of the Indian Penal Code is not applicable to immoveable, but only to moveable, property; (2) that the evidence tendered by him (Girdhar) was not taken; (3) that he offered in evidence the deed of

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sale of the property in dispute, which was not received; (4) that the dishonest taking of the property is not proved; (5) that the matter is one for a Civil Court to adjudicate upon; (6) that the illegal proceedings of the Subordinate Magistrate having been confirmed in appeal by the Acting Magistrate of the District, the proceedings of the latter are likewise illegal.

"The Acting District Magistrate was requested to report on the above petition, and certify the record in the case.

"Mr. Borradaile, in forwarding the record, has declined to furnish the report, on the ground that this Court has not authority to call for such a report.

"With reference to the Magistrate's objection, I am of opinion that it is competent to the Court of Sessions to call for a report. It is true that Sec. 434 of the Criminal Procedure Code only specifies the 'record,' but a report also is surely within the meaning and spirit of the said section. I found on joining this Court that my predecessor had on several occasions called for report which was furnished without objection by the Magistrates; and I, therefore, followed the same practice, and consider that it is extremely useful as affording the Magistrate an opportunity of noticing allegations in petitions affecting them personally, and also as an aid to the Court of Sessions in facilitating the transaction of business in miscellaneous matters, and in cases under Chap. XVI. of the Criminal Procedure Code, in which there may have been no English record kept.

"As regards para. 3 of the Acting District Magistrate's return, I would remark that although, doubtless, a Subordinate Magistrate is immediately Subordinate to the Magistrate of the District, the latter officer is, by Sec. 434, immediately subordinate to the Court of Sessions in respect of the legality of any sentence or order passed by him; and if, as in this case, any doubt attaches to the order rejecting the petition of appeal, it is competent to the Court of Sessions to call for the record, in order to satisfy itself as to the legality and regularity, or otherwise, of the order passed by the Acting Magistrate.

"In regard to the allegations in the petition to this Court, there seems to be much doubt whether immoveable property is within the meaning of Sec. 404 of the Indian Penal Code; for, although 'property' is the term used in the said section, the single illustration below the section refers to moveable property only; and the meaning and object of the section appear to be to prevent the unlawful appropriation of moveables between the decease of the owner and the time when the effects should, in ordinary course, be received by the heir or person authorized to receive them. \* \* \*

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"Therefore, on the questions: (1) of the illegality of the order of the Magistrate in respect of the denial of the right of producing evidence for the defence; (2) whether an offence relating to immoveable property be within the meaning of Sec. 404 of the Indian Penal Code; (3) whether the Court of Session is authorised to call for a report from any Magistrate under Sec. 434 of the Criminal Procedure Code; and (4) whether it is competent to the Court of Sessions to call for the record of a case such as the present one under the same section, I beg to refer the case for the orders of the High Court."

PER CURIAM—(TUCKER and GIBES, JJ.)—The Court reverses the conviction and sentence of the Subordinate Magistrate, and directs that the fine, if levied, be returned, as the Judges are of opinion that reading Secs. 403 and 404 together the latter section applies only to moveable property.

The Sessions Judge is to be informed that, as the Court of a Subordinate Magistrate is not a Court immediately subordinate to the Sessions Court, he has no authority to call for the record and proceedings of the Court. If persons complain before him that an error of law has been committed by a Subordinate Magistrate, and not corrected in appeal by the District Magistrate, the Sessions Judge should refer them to the High Court, who can deal with their complaint under Sec. 404 of the Criminal Procedure Code.

*Conviction and sentence annulled.*

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After this order was communicated to the Sessions Judge he solicited the High Court's decision on one of the points submitted by him; namely, whether it is competent to a Court of Sessions to call for a report from the Magistrate of the District, or a Magistrate F. P., on proceedings, the legality of which is under consideration by the Sessions Court, under Sec. 434 of the Code of Criminal Procedure; and the following resolution on the point was passed in Chambers on the 6th of April 1869:—

In the opinion of the Judges, the Sessions Judge ought not to call for a report from the Magistrate of the District in any case in which it is not competent to him to call for and examine the record and proceedings. But in trials held by the Magistrate of the District, or a Magistrate F. P., in which the Sessions Judge can call for the record and proceedings, he has also authority to call for a report.

April 21.

Reg. v. Ramchandra Eknath, et al.

*Written order issued by Magistrate—Criminal Procedure Code, Secs. 62 and 318.*

The temple of Pandharpur, a public temple, is visited at certain periods of the year by a large concourse of pilgrims. With a view to prevent the dangers arising from overcrowding, and to improve the ventilation, the Magistrate F. P., by a written order, under Sec. 62 of the Criminal Procedure Code, directed the hereditary priests of the temple to widen and heighten the doorway.

Held, that such order was legal under the above Section.

Semble, that the case would have been the same had the temple been private property; and also that the power of Magistrates to issue orders under the Section in question is entirely discretionary.

This was an application for the exercise of the High Court's jurisdiction under Sec. 404 of the Code of Criminal Procedure.

There is a temple dedicated to the god Vithoba at Pandharpur, in the district of Puna; and Hindus in large crowds visit it for religious purposes on several occasions during the year. In consequence of there being no proper ventilation,