Purshottam Das Banarsidas vs State Through Harshad Rai Natwarlal on 16 October, 1951

Equivalent citations: AIR1952ALL470, AIR 1952 ALLAHABAD 470

ORDER

Desai, J.

1. This is a reference by the Additional District Magistrate, Kanpur recommending that an order passed by the Special Railway Magistrate, First Class, Kanpur purporting to act under Section 523, Criminal P. C. be set aside. The learned Additional District Magistrate, who I must say, has written a well-reasoned and sound order has not recommended that another order be passed instead, but his intention does seem to be that another order be passed by this Court.

2. There is no dispute about the facts which are as follows:

3. Messrs. Harshad Eai Natvar Lal who are opposite party before me, consigned 240 bags of white zira from Unjha railway station to self at Kanpur. The railway receipt was sent by them to the Bank of Baroda at Kanpur with instructions to deliver it to Messrs. Baldeo Das Sita Ram of Kanpur on their paying RS. 30,000, the price of the goods. Messrs. Baldeo Das Sita Ram took time in finding the necessary money and in the meantime some one, who remains unknown and untraced, forged a railway receipt and on its strength took delivery of the goods from the railway at Kanpur. The forger then pawned the goods with Messrs Parsbotam Das Benarsi Das of Kanpur, the applicant before me, who on the security of the goods, advanced to him Rs. 16,000. The forger after collecting Rs. 16,000 absconded. In the meantime the Bank of Baroda presented the genuine railway receipt at the Kanpur railway station for the goods and then it was discovered that the delivery had been taken on a forged receipt. The railway reported the matter to the police who started investigation. The police traced out the goods in the godown of the applicant and seized them. After investigation the police came to the conclusion that the applicant had acted bona fide in taking possession of the goods from the forger. As the forger remained untraced, the police submitted a final report to the learned Magistrate and sought his orders regarding the disposal of the goods. The learned Magistrate ordered them to be delivered to the railway. That order was passed without hearing the applicant who, on hearing about it, made an application to the learned Magistrate for reconsidering it. The learned Magistrate heard the parties and by his order under revision refused to alter his earlier order. The learned Magistrate observed :

> "That delivery of the goods was taken from the railway by practising fraud upon it, that the railway was the aggrieved party and that the goods be restored to it because it has been wrongfully dispossessed of them."

He accepted the contention of the opposite party that the forger had no title to the goods and could pass no better title to the applicant. Messrs Harshad Rai Natvar Lal and the railway have joined hands and it is Messrs Harshad Rai Natvar Lal who have appeared before me to oppose the reference. The learned Additional District Magistrate is of the opinion that when it is not made out that the applicant had committed any offence, the goods should have been restored to him and not to the railway.

4. Before I can decide whether the order of the learned Magistrate is correct or not I must find out whether the order could be passed under Section 523 or any other provision of the Code. Sections 516A to 526 deal with the powers of Courts in the matter of disposal of property. Any order to be passed by a criminal Court must come under one or another of the sections. Any order that does not come under any of these sections is not an order passed under the Code. What order should be passed by a Court depends upon the section under which it passes the order. Under which section it should pass the order depends upon the circumstances in which the property was seized or produced before it.

5. When a police officer arrests a person, whether under a warrant or without warrant, the police officer may search him and place in safe custody all articles recovered from his possession; Section 51, Criminal P. C. If the arrested person has about his person any offensive weapons, the police officer may take them into his custody and deliver them to the Court; Section 53. The police officer can also seize all property in execution of a search warrant issued by a Magistrate under Sections 97 and 99A, Criminal P. C. Under Section 99 they are required to send the seized property at once to the Court issuing the warrant. Section 165 empowers an investigating police officer to search any place for anything necessary for the purpose of the investigation into any offence and seize the thing if found. If he submits a charge sheet against the accused, he must send to the Court any weapon or other article which it may be necessary to produce before it; Section 170. It will thus be seen that property may be seized by the police under various circumstances and that the property seized in some of those circumstances must be sent by them to the Court, while the property seized in other circumstsnces would remain with them. Property seized under Section 51 does not require to be sent to Court. If after investigation a final report is submitted to the Court, the property seized under Section 165 is not required to be sent to Court.

6. Property can be seized by the police in one more circumstance; Section 550 authorises a police officer to seize any property "which may be alleged or suspected to have been stolen, or which may be found under the circumstances which create suspicion of the commission of any offence."

This exhausts the circumstances in which the Code allows the police to seize property.

7. When any property said to have been used in the commission of any offence or regarding which any offence is said to have been committed is produced before any criminal Court during any enquiry or trial, the Court can make such order as it thinks fit for the custody of the property pending the conclusion of enquiry or trial; Section Section 516A.

When the enquiry or trial is concluded the Court "may mate such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property ..... produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence;" Section 517.

The order under Section 517 is supplementary to that under Section 516A. If the accused is convicted for theft or receiving stolen property and the property is restored to the person entitled to the possession thereof, the Court may compensate, any person who has bona fide bought the stolen property from the accused, from any money that might have been recovered from the accused, from any money that might have been recovered from the possession of the accused under Section 51, Section 521 allows certain property to be destroyed on the conviction of the accused. Section 523 reads as follows:

> "523(1) 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."

If the person so entitled is known, the Magistrate may order the property to be delivered to him and if he is unknown, he may detain it and issue a proclamation inviting claims within six months. If no claim is established and if the person in whose possession the property was found is unable to show that it was legally acquired by him, it will be at the disposal of the State Government; Section 524. These are all the powers of Courts.

8. The property, namely, the bags of Zira were not seized by the police under Section 51 or under Section 91 or in execution of any search warrant. It was seized during the investigation into a case of cheating; so it was seized under Section 165. It was not seized under Section 550. It was not alleged to have been stolen from the railway; it is the case of everybody including the railway that the forger obtained possession of it not by stealth but by cheating the railway by producing a forged railway receipt. Stolen property is defined in Section 410, Penal Code, as property, the possession of which has been transferred by theft, extortion or robbery and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed This definition is of no avail when one has to interpret the words "alleged or suspected to have been stolen". Different kinds of property may be called "stolen property" but only that property, the possession of which has been transferred by theft can be said to have been "stolen". The verb "stolen" has not such a wide meaning as the adjective "stolen" has been given in Section 410, Penal Code. Of course the bags of Zira are not "stolen property" even according to Section 410, Penal Code, but even if they were they are not alleged to have been "stolen", by any one. Nor were they "found under circumstances which create suspicion of the commission of any offence;" the property was found in the godown of the applicant. There was nothing suspicious in the situation or location of the

property. It was seized not because of its suspicious situation or location but because of a direct allegation that its possession was transferred through the commission of an offence. When the property has been seized on an allegation that it has been stolen, it cannot be said to have been seized on account of its being found under suspicious circumstances. The suspicious circumstances contemplated by Section 550 are the circumstances in which the property is situated or located and do not include a direct allegation that the property has been stolen. When the allegation that the property has been stolen is separately mentioned as a ground for the seizure, it cannot be said to have been included in the other ground of suspicious circumstances. If the suspicious circumstances include such an allegation, the separate mention of the allegation in the section would have been superfluous. The section should be so interpreted as to avoid any conclusion of superfluity. It is not clear whether the police themselves found out the bags of Zira in the applicant's godown or the applicant pointed them out to the police when they came to enquire; if the latter, the bags cannot be said to have been found under suspicious circumstances at all.

9. The disposal of the property is not governed by Sections 516A and 517. There was no enquiry or trial before any criminal Court nor was the property produced before the learned Magistrate. It is not a property governed by Section 521. As it was not seized under Section 550 its disposal is not governed by Section 523. Though Section 523 does not specifically refer to Section 550, it refers to those circumstances of seizure which are mentioned in 8.550. It is conceded that there is no other provision under which the order could have been passed by the learned Magistrate. It follows that the order under revision is not anj order passed, or even required to be passed under the Code and must be treated as an administrative or executive order. It was for the police, who had seized the property under Section 165, to dispose it of on their own responsibility. The learned Magistrate was not concerned with the disposal because neither was it produced before him, nor did he hold any enquiry or trial, nor did he authorise the seizure nor was the seizure even reported to him. Seizure of property under Section 550 must be reported at once to a Magistrate who is bound to pass orders for its disposal. In this case there is no evidence that the seizure oi the bags was reported to the learned Magistrate when it was made; his directions were sought for, when the investigation was concluded and the final report submitted. Seeking directions for disposal is not the same thing as reporting the seizure. The Code contains no provision for disposal of property seized during the investigation which results in a final report; evidently it leaves it to the police to dispose of it. A Magistrate has nothing to do with it. The order of disposal is intended by the Code to be an executive order of the police. It is open to the police to seek directions from a Magistrate and if the Magistrate chooses to give certain directions, he does not act under the Code and the directions given by him are not open to challenge in any superior Court. If the learned Magistrate had passed the order in the nature of an advice to the police or an administrative order, I have no doubt that I would have refused to interfere with it in revision. But he has expressly passed it under Section 523 and this fact gives jurisdiction to this Court to interfere with it on the ground that it could not be passed under that provision. The learned Magistrate had no jurisdiction to pass any order under that section. Therefore the order must be set aside as one passed without jurisdiction.

10. On merits also the order must be set aside. This would be the result whether I treat it as one passed under Section 523 or not. The plain duty of the police was to return the property to the applicant from whose possession it was seized, and who claimed to be entitled to its return. The

police had no concern with title, or right; they had no power even to ascertain who was entitled to the property. They had obtained it for the investigation and as soon as the investigation was finished, they had to return it. They had no right to deliver it to another person in any circumstance when the applicant did not disclaim its possession or title to its possession. So when they submitted the final report they ought to have returned the property to the applicant without referring the matter to the learned Magistrate, and when they referred the matter to the learned Magistrate, the latter should have advised them to do the same. He could not advise them to do anything but what was their duty and as it was their duty to restore the property to the applicant, he was bound to direct them to do the same. So, if the disposal was not governed by Section 523 the learned Magistrate ought to have directed the police to restore the property to the applicant.

11. Coming to the other alternative position, if the case were governed by Section 523, even then the learned Magistrate should have ordered the property to be restored to the applicant. Mr. Pathak said that this section gives wide discretion to the Magistrate His argument is that the Magistrate has discretion to deliver the property to any person. The section certainly gives discretion to the Magistrate but not so wide as is claimed. The discretion conferred by the words "such order as he thinks fit" is limited to the selection of one of the two alternatives, (1) delivery of the property to the person entitled to the possession thereof and (2) disposal of it. He has got the widest discretion in the matter of disposal; once he decides to dispose of it, he can dispose of it in any manner he likes. But if he decides to deliver it to a person, he must deliver it to the person entitled to its possession. He has got absolutely no discretion in the matter of finding out which person is entitled to its possession. The words 'as he thinks fit' cannot go with the words 'respecting the delivery of such property to the person entitled to She possession thereof. When the law itself lays down that the property should be delivered to the person entitled to its possession, there is no question of the Magistrates thinking fit or not fit. The question before him is of law, not of discretion How he is to proceed if he decides to deliver it to the person entitled to its possession is described in sub Section (2). If the person so entitled is known, he may deliver the property to him on such conditions as he thinks fit. If be is unknown, he may detain it and issue a proclamation inviting claims. If the persons entitled to the possession cannot be ascertained, the Magistrate can pass any order regarding its custody and production. In the present case the learned Magistrate has elected to deliver the property to the person entitled to its possession. He delivered it to the opposite party on the ground that it was entitled to its possession and no other ground. He held the oposite-party to be entitled to the possession because it was removed from its possession through the commission of an offence, and he did not consider the rights of the applicant; it did not occur to him that even if the railway had been deprived of the possession through the commission of an offence the applicant's possession might be lawful and he might be entitled to the possession even as against the railway. There is no law that once property is transferred through the commission of an offence, every body's possession becomes unlawful. The possession of the person who commits the offence may in certain cases be unlawful but that of other persons to whom the property is subsequently transferred may not be unlawful. The applicant was the person entitled to the possession of a property in the circumstances of the present case. It was the last person to be in possession and its possession has not been found to be unlawful. The railway might have been entitled to the possession sometime previously but that would not have prevented the accrual of a right in a third person to hold the property in his possession. As between the railway and the forger the railway might have been

entitled to the possession, if the law would not recognise the right of the forger to the possession But when a third party's right supervened, the right of the railway was altered. A Magistrate is not a civil Court and has no power to decide disputes about title. There is nothing in Section 523 to authorise a Magistrate to decide which party is the rightful owner of the property. His enquiry is limited to finding which person is entitled to the possession. Once he ascertains the person from whose possession the property was seized, he must hold him to be entitled to its possession unless his possession was unlawful. There is nothing to show that the applicant's possession was unlawful.

12. Section 528 does not contemplate any enquiry by the Magistrate Though he may have to find out which person is entitled to the possession, it does not follow that he must hold some sort of an enquiry. The Legislature assumes that whatever information is in possession of the Magistrate should suffice for his finding which person is entitled to the possession. In Chuni Lal v. Ishar Das, 4 Lah 38 at p. 42 Broadway J. observed:

> "The section itself does not make any magisterial enquiry imperative. It appears that the Magistrate has to satisfy himself on such material as is before him, who is entitled to possession."

Lobo J. also held in Sulleman Haji Ellias v. Emperor, A. I. R. (29) 1942 sind 89 that no enquiry was necessary. In Mohammad Yusuf v. Krishna Mohan, A. I. R. (25) 1938 cal 17 at p. 19. Biswas J. inferred from the provision about ascertaining the person entitled to possession that an enquiry is contemplated where there are conflicting claims. With respect, I do not think this is the necessary inference. When the person entitled to the possession is not known, some enquiry is contemplated by sub Section (2). The words "if such person cannot be ascertained" refer to a case where it is known that no amount of enquiry would result in the finding out of the person entitled to the possession. The failure of an enquiry held under Sub-section (2) is dealt with in Section 524. Oace an enquiry is held, subsequent orders are governed by Sub-section (1) of Section 524 Consequently, the provision in Sub-section (l) cannot refer to the failure of ascertaining the person entitled to the possession after enquiry; in other words it mast refer to the failure before any enqpuiry is held. There may be circumstances in which the property was found to suggest that the person who is entitled to its possession would not be ascertained. The property may be such that its possession would be unlawful and nobody would own that he was entitled to its possession. In such a case it can be said that the person entitled to the possession cannot be ascertained. In In re, Ratan Das Rangil Das, 17 Bom. 748 it was said that under Section 523 the Magistrate should hold enquiry regarding right to possession and not right to property. That was by the way because that was not a case governed by Section 523. A reading of Section 523 suggests that the Magistrate has to pass an order as soon as he receives a report of seizure from the police. The police have to report the seizure at once and the Magistrate has to pass the order for disposal of the property. Evidently an order has to be passed at once because after the seizure the property is at disposal of the Magistrate who must pass one order or another order. The seizure is reported to the Magistrate in order to obtain his orders. When the Magistrate has to pass the orders at once, he has no opportunity to make any enquiry, and if he cannot make any enquiry, all he can do, if he doe's not decide to dispose of it in some other manner, is to deliver it to the person from whose possession it was seized. When he has not held an enquiry as to the ownership or title he cannot deliver it to any other person on the

ground of his being entitled to the possession. No property seized from the possession of one person can, barring just exceptions, be delivered to another person by a Magistrate without some enquiry being held.

13. There are several authorities laying down that the person from whose possession the property was seized and who is not found to have committed any offence such as would render his possession unlawful, is the person entitled to its possession see; Laxmi Chand v. Gopikisan Balmukund, 60 Bom. 183; V. K. Vaiyapuri Chetti v. Sinniah Chetty, A. I. B. (18) 1931 Mad. 17. Devidan Sowcar v. Janaki Ammal A. I. R. (19) 1932 Mad. 428; Sattar Ali v. Afzal Mohammad; A.I.R. (14) 1927 cal. 532, In re Kuppammalf 4 Cr, L. J. 233 (Mad.) and U. Ba Hlang v. Balabux Sodam, A. I. R. (241 1937 Bang. 42.

14. In the case of Laxni Chand v. Gopi Kisan, 60 Bom. 183 Beaumont C. J. at p. 186 observed :

> "Where it is prayed that the parson from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then in my opinion the Magistrate can only hold that that person is entitled to possession of the property."
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> He also pointed out that the person who claims to be the owner has a remedy in a civil Court to recover the property from the person to whom it is restored under Section 528, though the burden would be upon him to prove his title, whereas if the property were restored to the owner, the burden would shift to the other person to prove his title and that there is no reason why the burden of proof in a civil suit should be affected by the seizure by the police of property in relation to which no offence has been proved.

15. When the person from whose possession the property was seized himself denies that it was seized from his possession, or his possession would be unlawful or he himself claims that he is not entitled to its possession on account of its being planted upon him or his holding possession over it on behalf of another person, he cannot be said to be the person entitled to its possession. That would be an exception to the general rule stated above. In U Ba Hlaing v. Balabux Sodani, A.I.R. (24) 1937 Rang 42 Eoberts C. J. said at p. 44;

> "It must be conceded that, on the materials which are ordinarily available when an order under Section 523 is made, the person entitled to the immediate possession of the property is usually the persoa from whom it was seized; but one can readily imagine circumstances under which the indisputable facts, or facts admitted by the parties contending for the possession of the property show that a person other than the person from whom the police seized the property is entitled to the possession thereof."

In Ramasami Aiyar v. Verikateswara Aiyar, 14 Ori L. J. 27 (Mad.) on a report by 'R' of theft against 'v' some property was recovered from the house of V, after investigation it was found to have been planted there by 'R' a final report was submitted by the police and the Magistrate, on being approached by the police ordered the property to be forfeited to Government and his order was upheld by a Bench of Madras High Court on the ground that the property had been used by 'R' for the purpose of committing an offence of fabricating false evidence. 'V' was not the person entitled to the possession because he did not claim to be so. The Court observed at. p 30:

> "If the offence be one relating to property, the proper order would, of course, bo to return it to the owner or person in possession. But this cannot be the proper order where the offence suspected is one committed by the person who is the owner or possessor of the property and who has used it for the commission of the offence."

16. Babu Ram v. Emperor, 43 Cr. L J. 164 (Oudh) was a case very similar to the present one; on a report made by M that Y had borrowed some ornaments from him and then pawned them dishonestly with B, the police recovered them from B and then submitted a final report and it was held that the Magistrate should have returned the ornaments to (sic) from whose possession they were seized. Agarwala J. after considering various authorities including cases of Viyapuri Chetty, A. I. R. (18) 1931 Mad. 17; Devidan Sowcar and U. Ba. Hlaing, A. I. R. (24) 1937 Rang. 42 observed that "The property seized during the investigation of a crime should except in exceptional cases be restored to the person from whose possession it was taken."

The learned Judge did not think that the fact that B had admitted half-heartedly his unlawful detention of the ornaments took the case out of the general rule. He stressed the fact that B had not been prosecuted and had not been clearly found to have committed any offence. Aa no offence had been committed in respect of the property by him, he was entitled to be restored to its possession.

17. Mr. Pathak relied upon A. K. A. R. A. Ghettyar v. Ma Saw Hla, A.I.R. (24) 1937 Rang. 450; Subbaramma Ayyar v. Damodaran, 38 Cri. L. J. 690 (Mad.) and Timma Reddi v. Rami Reddi. (1941) 1 Mad. L. J. 421. In the case of Subbaramma Ayyar, 38 cri. L. J. 690 (Mad) Y borrowed an ornament and then pawned it with S; Y was convicted and the ornament which was recovered from his possession was ordered by the Magistrate to be returned to the owner. Horwill J. said that the question of bona fides or mala fides of S had not been gone into by the Magistrate, that the Magistrate was given a wide discretion and that when he did not exercise it on some wrong principle and did not return the property to somebody obviously not entitled to it, he would not interfere in revision. With great respect to the learned Judge, I disaent from the view taken by him.

18. In the case of Timma Reddi, 1941-1 Mad. L. J. 421, a cow of R was stolen or went astray. R made a report under Section 411 Penal Code against T, the police recovered it from T's possession, the police submitted a final report because T was found guilty only under Section 403, Penal Code (which was not cognizable) and not under Section 411, Penal Code, the Magistrate accepting the report ordered the cow to be returned to B and Horwill J again maintained the order. He observed on p. 423 :

> "Where a case is struak off as being of a civil nature, it means that the Magistrate has come to the conclusion that a criminal offence has not been made out and that it is only after adjudication by a Civil Court that the ownership of the property can be determined. He is therefore bound to return the property to the person from whom it is taken and to direct the complainant to have recourse to a Civil Court if he is so advised."

In that case he found that an offence had been made out. That case is clearly distinguishable from the present case; the possession of T was found to be unlawful and he could not be said to be a person entitled to the possession of the cow.

19. In the case of Sulleman Haji Ellias, A. I. r. (29) 1942 sind 89 the faota were that Y stole an ornament of T and sold it to X, who knew that it belonged to T and during the investigation made a false claim that T himself had sold it to him through Y, and the ornament was returned to T. The ornament was not returned to x because his possession was found to be dishonest. Lobo J. observed on p. 91 :

> "Where it was proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate might have to consider questions of title in order to determine the best right to possession. But where it appeared that the police had seized property from a person who was not shown to have committed any offence in relation to that property, then the Magistrate could only hold that that person was entitled to possession of the property."

20. In the case of A. K. A. R. A. Chettyar, A.I.R. (24) 1937 Rang. 450 Y stole property belonging to M and pledged it with X, the property was recovered from the possession of X and then restired to M. Y. who had absconded, could not be placed on trial and all that the Magistrate could do was to record evidence under Section 512, Criminal P. C., Mackney J. observed at p. 451 :

> "Where the known facts plainly show that the property has been stolen, it would be intolerable to allow the person in whose possession the property is found to retain it as against the rightful owner, and force the latter to a civil suit for its recovery if the accused absconds."

Our law makes a distinction between stolen property and property, the possession of which has been transferred from the rightful owner to another person through the commission of an offence of cheating. Property, the possession of which has been transferred from the rightful owner to another person through the commission of offences of theft or extortion or robbery or criminal misappropriation or criminal breach of trust is "stolen property" but the other property is not "stolen property". Whoever receives or retains in his possession "stolen property" knowing it to be so commits an offence ; possession of other property is not an offence. Where "stolen property" is found in possession of another person, there arises the presumption that he knew that it is "stolen property". It is on account of this that property which was stolen or criminally misappropriated or in respect of which criminal breach of trust was committed and is recovered from the possession of a

third person, he is not held to be entitled to be restored to it. Section 519 contemplates that suah property, on conviction of the offender must be restored to the rightful owner and not to the third person even though he might have received it in his possession bona fide. There is a reason for this and it is that dishonest possession of the third person being an offence the Court cannot very well restore "stolen property" to the person from whose possession it was seized. If he did not previously know that it was "stolen property", after the conviction of the thief he should know that it was stolen property. As the possession of the third person would be an offence, he cannot be said to be the person entitled to its possession and only the rightful owner can be held to be the person entitled to its possession. But when an offender deceives the rightful owner and obtains possession over his property and then sells or pledges it with a third person, the property not being "stolen property", the third person's possession is not an offence and he can be held to be the person entitled to its possession.

21. The right of an innocent purchaser of property stolen or obtained by fraud was discussed by the Court of Appeal in Vilmont v. Bentlev, (1887) 18 Q. B. D. 322, H obtained goods by false pretences from G and pledged them with D from whom B purchased them in the ordinary course of business. G, on discovering the fraud committed by H, indicted him and he was convicted for obtaining the goods by false pretences. G then claimed that the goods be restored to him, while B claimed to be entitled to possession on the ground of his being an innocent purchaser for value. The Court of Appeal held that G was entitled to be restored to his possession. The case was decided in accordance with Section 100 of 24 and 25 vict. C. 96 The previous statute, 21 Hen. 8, C. 11, provided that when goods had been stolen and the thief had been convicted by reason of the evidence given by the owner, the owner should be restored to his goods. Under the common law, there was a distinction between goods obtained by theft and goods obtained by fraud. Theft did not affect the title of the owner and did not transfer it to the thief. A bona fide purchaser from the thief got no better title ; but if he purchased in market overt the common law protected his right :

> "Goods may be obtained by false pretences in two ways. (1) By what I may call bare false pretences. In that case the property on the goods did not pass ..... (2) Goods may be obtained by false pretences, which lead to a contract of sale, in which case it has been held that the contract is viodable--not void, and until it is avoided, it passes the property in the goods." (Per Lord Esher M. B. at p. 328.
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> So an innocent purchaser from one who had obtained goods under a fraudulent contract acquired a good title, and after this the contract could not be avoided by the defrauded owner. See also Lindsay v. Cundy, (1875) 1 Q. B. d. 348. The Statute of Henry the 8th altered the law protecting an innocent purchaser in market overt of stolen property or property obtained by bare false pretences, by providing that if the owner got the thief convicted, the goods should be restored to him. The statute was enacted to stimulate persons from whom goods had been stolen to prosecute the thief. The Statute of Victoria applied the Statute of Henry the 8th to a new series of transactions, e. g. goods obtained by false pretences resulting in a voidable contract. We are not concerned with either of the Statutes, and according to the common law principles the title over the bags of Zira passed to the applicant, who was an innocent

purchaser (or pledgee) in market overt.

22. The Legislature has used the words "entitled to possession 'and not the words' in actual possession" or "from whose possession the property was seized" for a good reason and that is to prevent the restoration of the property to persons who do not claim to be entitled to possession or do not admit their possession or whose possession would be unlawful or who obtained possession through the commission of an offence of theft, misappropriation etc.

23. It was vehemently contended by Mr. Pathak that it is the duty of the criminal Court to wipe off the crime and to restore the rightful owner to possession leaving the innocent purchaser to his remedy in a civil Court. That is not a rule of justice, equity and good conscience, the common law rule being quite the opposite. There is no justification for the criminal Court's ignoring the accrual of a right in a third party, particularly when nobody has been prosecuted and the third party has not acted dishonestly. The rule to be applied is that laid down by Telang J. in the case of Ratan Das, 17 Bom. 748, at p. 754, namely, "property taken under the authority of the law for a particular purpose should, on the fulfilment of that purpose, go back to the custody from whence it was taken."

and adopted by Sir Arnold White C. J. in the case of Kuppammal. When nobody is convicted or even prosecuted, there cannot arise any question of wiping off the effect of a crime. When the offender is convicted, the effect of the crime committed by him may be wiped off as contemplated by Section 519, Criminal P. C. But when the investigation does not result in conviction or even in prosecution, all that the police or the Court can say is that the person who was last in possession of the property is the person entitled to its possession.

24. I, therefore, agree with the learned Additional District Magistrate that the learned Magistrate ought to have directed the bags of Zira to be restored to the applicant and accept the reference. The order of the learned Magistrate dated 6-12-1950 along with the previous order to the same effect is set aside. As it is for the police themselves to deal with the property, I would not pass any order in substitution of the orders set aside. The learned Magistrate may instruct the police accordingly.