APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Napier.

1915. March 29 and 30 and April 9.

KRISHNAMACHARI, ACCUSED,

v.

MESSRS. SHAW, WALLACE AND COMPANY, COMPLAINANTS.*

Criminal Procedure Code (Act V of 1898), ss. 179 and 181—Complainant in Madras town doing business in mofussil by agent—Agent's duty to remit principal's money to Madras—Misappropriation by agent in mofussil—Jurisdiction to try offences under Indian Penal Code (Act XLV of 1860), sec. 406 or 409.

A firm in the town of Madras dealing in kerosine oil, authorized an agent in a mofussil station to sell their oil and remit to them at Madras the sale-proceeds less his commission. The agent sold the oil in the mofussil and without sending the proceeds misappropriated the same:

Held: (*a*) that the proceeds were the property of the Madras firm, (*b*) that the case was governed by section 181 and not section 179 of the Criminal Procedure Code, and (*c*) that as the misappropriation and consequent loss occurred to the Madras firm primarily only in the mofussil station, the Magistrate at that station and not the one in Madras had jurisdiction to try the offences under section 406 or 409, Indian Penal Code.

Cases on the subject reviewed.

CASE referred for orders of the High Court under section 438 of the Criminal Procedure Code by P. NARAYANA MENON, the Third Presidency Magistrate, Georgetown, Madras.

The facts of the case appear from the judgment of OLDFIELD, J.

J. C. Adam, the *Crown Prosecutor* for the Crown.

The Honourable Mr. *T. Richmond* for the complainant.

R. N. Aingar for the accused.

OLDFIELD, J. OLDFIELD, J.—The question on this reference is whether the Third Presidency Magistrate has jurisdiction to try the accused for an offence punishable under section 406 or 409 of the Indian Penal Code or whether he should return the complaint for presentation to a competent Court at Nandyal, Kurnool district.

The circumstances are set out in the complaint only generally. But the material allegations appear from the evidence already taken and the statements of complainant's counsel, to be that the accused was appointed agent for the sale of complainant's oil at Nandyal, that his periodical reports showed a certain quantity of oil sold and a certain sum of money received and (after deduction

* Criminal Revision Case No. 168 of 1915 (Case referred No. 15 of 1915).

of commission, etc.) to be accounted for and that, when called on to account, the accused failed to do so, leaving Nandyal after locking up his place of business and secreting his books, the inference being that he had made away with the funds in his charge. No suggestion is made that any oil entrusted to him has been converted to his use or dealt with otherwise than in accordance with complainant's instructions; that is, by sale to customers. The misappropriation relied on is accordingly not of the oil, but only of the money received for it; and we can therefore dismiss from consideration what seems to have been thought material before the Magistrate, the allegations as to the origin of the oil, whether it came from Madras or Cocanada. The fact that the accused was appointed agent by an order sent from Madras is also without significance in a criminal case. The only ground, which we have to consider as justifying the jurisdiction of the Madras Court, is that loss ensued there to the complainant's firm as a consequence of the accused's conduct at Nandyal and that the case is therefore covered by section 179, Criminal Procedure Code, not by section 181 only, in which offences under sections 406 and 409 are specially dealt with. In accordance with the ordinary canons of construction the special provision should ordinarily receive effect unqualified by the general. Clear reason must therefore be shown in the wording of section 179 or otherwise, before complainants' contention can be accepted.

That contention has been endorsed and negatived in different decisions; but, though in some of them attempts have been made to state the principle applicable in more or less general terms, the weight of such statements is impaired by the facts that either the allegations before the Court and the exact relations between the parties are not stated fully in the reports or the conclusion may have been influenced by uncertainty regarding the place, in which the money or property concerned was received or converted by the accused *Rajani Binod Chakravarti* v. *All India Banking and Insurance Co., Ld.*(1) is an instance of the former class of cases, and *Langridge* v. *Atkins*(2) of the latter.

In this Presidency *Ramasami Asari's* case(3) no doubt supports both the propositions, which the prosecution has to

(1) (1914) 22 I.C., 192. (2) (1913) I.L.R., 35 All., 29.
(3) (1914) M.W.N., 324; s.c., 26 M.L.J., 235.

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OLDFIELD, J.

establish, that (1) the offence is constituted by the accused's dishonest conversion and the loss, which ensued as its consequence and (2) such loss ensues, not only where and when the conversion takes place, but also where the complainant ordinarily receives the accused's accounts and remittances. In *Rambilas* v. *Emperor*(1), however, two other learned Judges did not feel compelled to treat this as a considered ruling on the point; and with all due deference we follow them so far. Their decision however negatived the first of the propositions above stated on the ground that the existence of dishonest intention, not the ensuing of loss, was the essential element in the offence of criminal breach of trust and that there was therefore no question of any consequence or of the application of section 179; and we respectfully dissent from this view. For, we are unable to conceive and the learned counsel has been unable to suggest any case, in which more than mere preparation or attempt could be held established, but no loss whatever, it may be only a temporary or highly insignificant one, could be found to have been caused. Our conclusion is in fact that the loss ensues immediately on the conversion, because by it the property of the principal entrusted to the agent, is diminished in the latter's hands. It is the complainant firm's case that accused's collection (less commission) belonged to it from the date of receipt, and it is not alleged that any appropriation was necessary to change their ownership. The date of conversion may be uncertain and susceptible of no more definite statement than as prior to the proper date for remittance. That however cannot alter the fact that the firm's funds in Nandyal were diminished. It follows that primarily at least it suffered wrongful loss there.

Complainant's second proposition stated above is clearly essential to his contention. For section 179 can be applied only to cases, in which the consequence, necessary to constitute the offence, ensues in some place other than that, in which the accused's act is done. It has been supported with reference to the present case on the ground that, although the firm's loss at Nandyal may have been a primary consequence, the loss at Madras, the firm's headquarters, where its funds are kept, was a secondary one and was sufficient to attract the

(1) (1914) M.W.N., 894.

operation of the section. This distinction is not recognized explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *Langridge* v. *Atkins*(1) as the foundation of the decision in *Ganeshi Lal* v. *Nand Kishore*(2) on which the accused relies; and it was not drawn in the former case, because the averments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Meru* v. *Jethabhai*(3) where the act in question was a complete causing of grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not affect the venue. We follow these authorities and hold that the complainant's firm's secondary loss at Madras will not give the Third Presidency Magistrate jurisdiction. He must return the complaint for presentation to competent Magistrate having jurisdiction over Nandyal.

OLDFIELD J.

NAPIER, J.—I concur.

NAPIER, J

N.R.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastriyar.

AYYAKUTTI MARKONDAN (PLAINTIFF), APPELLANTS,

v.

PERIYASAMI KAVUNDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1915. April 14.

Transfer of Property Act (IV of 1882), sec. 83—Usufructuary mortgage—Hypothecation—Deposit of usufructuary mortgage amount only—Refusal by mortgagee—Subsequent deposit of hypothecation amount—Compound interest at enhanced rate—Penalty—Deposit of compound interest at the original rate only, sufficiency of—Acceptance by Court, as reasonable compensation, effect of—Mesne profits, claim for, by plaintiff from date of deposit, if sustainable.

The plaintiff, as the vendee of certain lands which were subject to a usufructuary mortgage as well as a hypothecation in favour of the defendant, sought

(1) (1913) I.L.R., 35 All., 29. (2) (1912) I.L.R., 34 All., 487.
(3) (1906) 8 Bom. L.R., 513.

* Second Appeal No. 1234 of 1912.