

1895

NAJJU KHAN
v.
IMTIYAZ-UD-
DIN.

of other co-sharers. One of the other co-sharers has brought this suit to have a mandatory injunction for the demolition of the building. The suit was resisted upon the ground that the land was not joint. This part of the claim to which we are referring was decreed by the first Court. On appeal, the Subordinate Judge dismissed the suit so far as this part of the claim is concerned; the other part of the claim had been dismissed by the first Court and from that there was no appeal.

The plaintiffs have appealed from the decree of the Subordinate Judge. The Subordinate Judge was of opinion that, although the land was common land held jointly by the co-sharers, the defendant's new building did not cause any direct loss to the other co-sharers. That is not the point in our opinion. The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favor one co-sharer adversely to the other co-sharers making a partition in his own favor, and selecting the portion of the land he likes by erecting a building upon it. This case is within the principle of the decision in *Shadi v. Anup Singh* (1). We set aside the decree of the Court below with costs in both Courts and restore and confirm the decree of the first Court.

Appeal decreed.

REVISIONAL CRIMINAL.

1895

December 9.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burhitt.

BUDDHU v. BABU LAL.

Act No. XLV of 1860 (Indian Penal Code) section 409—Criminal breach of trust—Conviction for Criminal breach of trust on a general deficiency in accounts.

Held that a person accused under section 409 of the Indian Penal Code might be legally convicted of the offence defined in that section on proof of a general deficiency in his accounts, and that it was not necessary that the receipt of and non-accounting for specific items should be charged and proved against him. *Queen-Empress v. Kellie* (2) approved.

In this case one Babu Lal had been convicted of the offence under section 409 of the Indian Penal Code by a first class Magistrate of Allahabad, and sentenced to six months' rigorous imprisonment

(1) I. L. R., 12 All., 436

(2) I. L. R., 17 All., 163

1895

 BUDDHU
 v.
 BABU LAL.

and a fine of Rs. 550, or in default to one year's rigorous imprisonment. It appears that the complainant, Buddhu Lal, was a grain merchant and the accused was his agent for the sale of grain, paid by Buddhu Lal at the rate of Rs. 5 per mensem. The charge against Babu Lal consisted of three counts. The first was for the misappropriation of Rs. 600-10 said to be due, after certain deductions, upon a balance of accounts struck in 1952 Sambat. The second was in respect of an item of Rs. 127-15-3 for debts due from before 1949 Sambat. The third was in respect of an item of Rs. 16-8 for the rent of a house said to have been received by Babu Lal for his master and not paid over in full. The Magistrate after examination of the account books of both parties found that the charge was proved as to the second and third counts, and as to the first, was proved to the extent of Rs. 393-14-9, and accordingly convicted and sentenced Babu Lal as above indicated.

Babu Lal appealed to the Sessions Judge, who, after remarking on the fact that each of the sums charged against the appellant was not a single sum misappropriated at a definite time, but was made up of various items received from time to time and not accounted for, acquitted the appellant on the ground that a charge of this nature was bad in law.

Buddhu Lal thereupon applied to the High Court for revision of the order of acquittal.

Mr. *A. E. Ryves* for the applicant.

Mr. *G. P. Boys* for the opposite party.

EDGE, C. J., and BURKITT, J.—A Magistrate of the first class convicted Babu Lal on three charges of the offence punishable under s. 409 of the Indian Penal Code, and sentenced him accordingly. Babu Lal appealed to the Sessions Judge, and the Sessions Judge, as we understand his judgment, was of opinion that Babu Lal was not in law liable to be tried, "on the aggregate of numerous alleged offences." We do not quite understand what the Sessions Judge precisely meant by that, but we surmise that he may have thought that a man could not be convicted of the offence under s.

1895

BUDDHU
v.
BABU LAL.

409 of the Indian Penal Code in respect of the deficiency proved on an aggregate of several amounts received by him for his employer. There were in fact three specific charges on which the Magistrate had convicted Babu Lal. We are aware that it has been considered by some that a charge of embezzlement should be confined to a specific sum received and not accounted for. Where it is possible to prove that a specific sum received has been embezzled, the charge should be confined to that particular item, but where an agent or servant has received over a period of time several sums on behalf of his employer, and has, during the same time, expended moneys on behalf of or made payments to his employer, but still a deficiency was left, for which the agent or servant would or could not account, it might be impossible to fix him with the embezzlement of any one particular item received by him, although, taking the items proved on both sides of the account and his course of conduct, it might be obvious that he had embezzled a large sum of money, namely, the difference between the amounts received and those expended and accounted for. The question as to whether an accused person can be charged with criminal breach of trust in respect of a general deficiency has been dealt with by our brother Aikman in *Queen-Empress v. Kellie* (1). With his judgment in that case we entirely agree. The accused does not appear to have been prejudiced by three charges as to general deficiencies having been tried together, and consequently section 537 of the Code of Criminal Procedure would apply. The learned Sessions Judge was probably not aware of the judgment of our brother Aikman to which we have referred, and consequently went wrong in law. We set aside the order of the Judge, and direct him to proceed with the trial of the appeal before him of Babu Lal according to law. We direct a warrant to issue for the arrest of the accused. The warrant will direct that he be brought before the Court of the Sessions Judge, and the Sessions Judge may commit him to prison pending the disposal of the appeal or may admit him to bail.

(1) I. L. R., 17 All., 159.