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be modified by giving the plaintiff a decree as claimed except as to mesne profits.

TUDBALL, J.—I agree. It seems to me that there can be no question that section 233 (*k*) and the rule of *res judicata* do not bar the present claim in any way. As regards order II, rule 2, it is clear that that portion of the Code of Civil Procedure does not apply to the courts acting under the Revenue Act. That Act lays down a procedure in chapter IX for all Revenue Courts. It does make certain portions of the Civil Procedure Code applicable to those courts, but only to a very small extent, and certainly it does not apply order II, rule 2. As far as I can see there is nothing in the Revenue Act which will prevent a man from applying in the Revenue Court for the partition of a portion of his share in the mahal and to have that portion separated into a distinct mahal. Under these circumstances it is impossible to apply the principles of order II, rule 2, in partition cases in the Revenue Court. With regard to the plea raised under section 41 of the Transfer of Property Act this is completely settled by the judgement of the court below. All the circumstances of the case negative the plea that there was any consent either express or implied.

In my opinion the appeal should be dismissed. The cross-objection should be allowed so far as the claim for possession of the plaintiff's half share is concerned and also as to costs. I would disallow the claim for mesne profits.

MUHAMMAD RAFIQ, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal will be dismissed, the cross-objection will be allowed save in respect of mesne profits. The plaintiff's claim shall stand decreed except as to mesne profits with costs in all courts.

Appeal dismissed. Cross-objection partly allowed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR *v.* BHIMA AND ANOTHER.*

1916 *February*, 21.

Criminal Procedure Code, section 239—Procedure—Joint trial—Thief and receiver triable together.

Held that, in the absence of evidence clearly disassociating the act of receiving the stolen property from the theft thereof, the theft and the receipt of the

*Criminal Reference No. 92 of 1916.

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stolen property may be considered as parts of the same transaction. It would not, therefore, be illegal to try the thief and the receiver jointly. *Emperor* v. *Balabhai Hargovind* (1) followed.

THE facts of this case were as follows:—

A theft was committed on the 26th of September, 1915, in the house of one Nazir Jan. Some weeks later a Sub-Inspector, whilst investigating another case, found in the house of one Bhima part of the property which had been stolen from Nazir Jan. Further, in consequence of something said to him by Bhima the Sub-Inspector searched the house of one Dwarka, and in that house discovered more of the property stolen in the robbery at Nazir Jan's. On the 26th of September, Bhima and Dwarka were tried jointly and convicted. They applied in revision to the Sessions Judge, who, being doubtful whether the joint trial did not amount to an illegality, referred the case to the High Court.

Neither the accused nor the Crown were represented.

KNOX, J.—Bhima and Dwarka have been convicted under section 411 of the Indian Penal Code. They were tried together. They applied in revision to the court of Session at Cawnpore and took sundry objections to the conviction. These objections have been found to have no weight by the learned Sessions Judge, but he says that at the very last the learned pleader who appeared in support of the application raised the objection that the two convicts should not have been tried together. This objection was based on section 239 of the Code of Criminal Procedure. The learned Sessions Judge considering this objection a good objection has referred the case to this Court. It would appear that on the 26th of September the house of one Nazir Jan was broken into and property stolen therefrom. The police failed to trace the thieves, but later on, somewhere in the month of October, a Sub-Inspector, who was inquiring into another case in which Bhima was suspected, found on the premises occupied by Bhima, who tried to hustle him away, property which had been stolen from Musammat Nazir Jan. Bhima on being further pressed dug out a steel trunk and handed it over to the Sub-Inspector. In consequence of something which the Sub-Inspector learnt from Bhima he went on to search the houses occupied by Dwarka and Rukna. In Dwarka's house other property was found and

(1) (1904) 6 Bom. L. R., 517.

another steel trunk. The property thus found and the steel trunk had been identified by Nazir Jan as property either of her own or of her sister since deceased, Nawab Jan. Both were identified as property stolen from the house broken into in the month of September. Both Bhima and Dwarka deny that this property was found in the houses respectively occupied by them. The case then against the two accused amounts to this. Musammat Nazir Jan's house was broken into at the end of September; stolen property is found in October, partly in the house of Bhima and partly in the house of Dwarka. Can the reception of the property with guilty knowledge of Bhima and Dwarka be considered to be part of the same transaction, *viz.*, burglary in the house in September? The Calcutta High Court appear to hold in a somewhat similar case that the theft and the reception of the stolen property with guilty knowledge could not be regarded as forming part of the same transaction. This was held in *Abdul Majid* v. *Emperor* (1). The case was heard by three Judges. One of the Judges, Mr. Justice BRETT, dissented and held that there was no reason why the theft of the property and receipt of the stolen property in that case should not be considered to form part of the same transaction. On the other hand he held there were good reasons to consider that thefts are generally committed not so much for the property as for what the property can be sold for, and persons concerned in the theft as well as those engaged in the purchase or dishonest receipt of the property are all engaged at different stages in what amounts to the same transaction. In that case as in this no evidence was offered to prove that the dishonest receipt of the different articles found in the possession of the different accused had been taken at different times. Mr. Justice BRETT referred to a case in which the Calcutta High Court had in 1880 held that the thief and the receiver of property stolen at that theft might be tried together under the provisions of section 239 of the Code of Criminal Procedure. This, he added, had been the common practice in the courts in the presidency of Bengal both before and after the decision in *Re. A. David* (2).

This question has been considered by the Bombay High Court in *Emperor* v. *Balabhai Hargovind* (3). Two learned Judges

(1) (1904) I. L. R., 33 Calc., 1256. (2) (1880) 5 C. L. R., p. 574.
(3) (1904) 6 Bom. L. R., 517.

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of the Bombay High Court held that the guilty receipt of the property stolen was a continuation of the act of theft or criminal breach of trust. They also pointed out that the practice generally speaking in the Bombay Presidency had been to try the person committing the theft or criminal breach of trust and the receiver of stolen property jointly where it was practicable and had never been questioned until the present case in 1904. In 1905 the same question came again before the Bombay High Court. It was argued before two learned Judges who differed and the case then went to a third Judge. RUSSELL and BATTY, JJ., held that the trial of the three accused in that case together was in contravention of the provision of section 239 of the Code of Criminal Procedure and therefore illegal. Mr. Justice ASTON held that the charges could be tried together, and cited another case of the Bombay High Court, *Emperor* v. *Keshav Krishna* (1). That case, however, differs from the case before me; there were several receivers of the stolen property and Mr. Justice BATTY evidently leans to the view that the acts of dishonest receipt had been on totally different occasions; he cited *Emperor* v. *Balabhai Hargovind* (2) without any disapproval and distinguished it from Jetha Lal. The question does not seem to have been raised in this Court up to the present, but so far as my experience goes the practice in this province has been the same as that which prevails in Bombay viz., that where practicable the thief and the person who receives stolen property are tried together and such trial has not been held to be in contravention of the provisions of section 239. I need not add that if the evidence shewed that the act of guilty receipt was separated by a clean cut, so to speak, from the act of theft, such an exception might be taken with success. But, where a thief has taken the property stolen to a receiver or receivers, I agree with Mr. Justice CHANDAVARKAR that the difference affects only the mode of proof, and the act of receipt has, unless shown otherwise, a necessary connection with the theft. For these reasons I find no force in the objection taken by the learned Sessions Judge of Cawnpore and I direct that the record be returned.

(1) (1904) 6 Bom., L. R., 361. (2) (1904) 6 Bom., L. R., 517.