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this case the learned Judge of the appellate court had to consider whether the allegation made on the 25th of October, 1924, could or could not be taken into consideration in deciding the application made on the 14th of October, 1924. While purporting to follow a ruling of this Court, he really misread that ruling and refused to consider the application of the 25th of October, 1924. If he had considered the application of the 25th of October, 1924 and had come to the conclusion rightly or wrongly that he should not consider the application because the judgement-debtor had no right to apply for an amendment of this previous application, I should have held that no revision lay. But he did not at all consider the application of the 25th of October, 1924. He had jurisdiction to consider the matter and he refused to consider it. In doing so he acted with material irregularity. I hold that a revision does lie. I allow the application, set aside the order of the court below and also the order of the court of first instance and send back the case to the court of first instance.

Costs in this Court and in the lower appellate court will abide the result.

Application allowed.

REVISIONAL CRIMINAL.

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November, 13.

Before Mr. Justice Sulaiman.

EMPEROR *v.* INDAR SINGH.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 403 *and* 406*—Dishonest misappropriation and criminal breach of trust—Misappropriation not necessarily for the benefit of the misappropriator himself—Trustee repudiating the trust and setting up the rights of a third person.—Provision for civil liability no bar to criminal liability.*

Section 403 of the Indian Penal Code is in no way restricted to appropriating property to one's own use. If a trustee

* Criminal Revision No. 449 of 1925, from an order of Kunjeshar Nath Rai, Additional Sessions Judge of Moradabad, dated the 21st of July, 1925.

repudiates the trust and asserts that he holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claims to it.

Where attached property is entrusted to a custodian, the mere existence in the *supurdnama* of a stipulation that on failure to produce the property he will be liable to pay a stated sum as price does not necessarily absolve him from criminal liability for misappropriation.

This was an application in revision against the applicant's conviction of an offence under section 406 of the Indian Penal Code. The facts were as follows :—

One Harbans was declared an insolvent and Lala Ram was appointed receiver of his estate in January, 1925. The receiver attached certain heads of cattle belonging to the insolvent and made them over to the applicant after taking a *supurdnama* from him. The receiver first fixed the 13th of February for sale and three days earlier he sent a notice to the applicant to produce the cattle at the place where the auction was to take place, but the notice was returned unserved and no auction took place. On this the receiver fixed another date for sale and sent a fresh notice to the applicant but even on that date the cattle were not produced, nor did the applicant turn up. Subsequently the receiver received a notice from the applicant to the effect that the cattle attached by the receiver did not belong to the insolvent but belonged to his brother, who had filed an objection in the execution court, and that the receiver had no right to attach them. The receiver replied that the applicant was bound to produce the cattle and he had no right to stop their production even if the insolvent's brother had filed an objection.

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To this the applicant replied that the *supurdnama* was not binding on him and that he in fact filed a complaint under section 420 of the Indian Penal Code in respect of it. On such reply being received the receiver, with the permission of the Additional District Judge, filed a complaint out of which this revision has arisen.

The complaint filed by the accused under section 420 was dismissed summarily and he has not had that order revised. At the trial of the present case the accused denied that any cattle of Harbans had in fact been attached or handed over to him and he even denied a proper execution of the *supurdnama*. The courts below, however, have found these questions of fact against the applicant.

The applicant was convicted under section 406, Indian Penal Code, and the conviction was upheld in appeal. He then applied in revision to the High Court.

Pandit *M. N. Raina*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

The judgement of SULAIMAN, J., after stating the facts as above, thus proceeded :—

The learned vakil for the applicant has argued, firstly, that no offence under section 406 was committed as there has been no misappropriation, and, secondly, that in view of a clause in the *supurdnama* for the payment of the price of the cattle, there was no criminal misappropriation.

The applicant has not put the cattle to his own use nor has he disposed of them dishonestly. What has happened is that he is holding them still as trustee, but he is denying that he is holding them on behalf of the receiver from whom he had taken them. He now asserts that the cattle belong to another

person on whose behalf he holds them. Misappropriation has not been expressly defined in the Indian Penal Code. The illustrations to section 403 all relate to cases where a person appropriates the article to his own use, but the illustrations cannot be taken to limit or narrow the scope of section 403 itself. It seems to me that if a person sets apart an article for the use of another person, of which article he is a trustee of the complainant, he misappropriates it even though he has not put it to his own use. Section 403 is in no way restricted to appropriating property to one's own use. If a trustee repudiates the trust and asserts that he now holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claim to it. The applicant got possession of the cattle from the receiver and undertook to return them to the receiver. When subsequently he repudiated the right of the receiver to attach the cattle and asserted that they really belonged to the insolvent's brother and that he would not hand them over to the receiver, he must be deemed to have committed a misappropriation.

As regards the second point, the relevant portion of the *supurdnama* is as follows: "Whenever the court or the receiver demands the production of the attached property I shall deliver the same without objection. If for any reason I fail to deliver them, then I shall pay the price, Rs. 950." The argument of the learned vakil for the applicant is that when it was clearly stipulated that in case of failure to deliver the cattle the applicant would be liable to pay their price amounting to Rs. 950, his default cannot amount to a criminal misappropriation, and that at best his liability was only a civil liability.

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But the mere fact that there was a civil liability does not necessarily absolve one from criminal liability. When a receiver attaches property and entrusts it to some person in the village, he does not purport to sell it to him or dispose of it at that time. The receiver may not even be in a position to know its true value. The intention of the parties is that the articles should be returned in specie or produced at the time when the auction sale is to take place. The covenant that the accused would be liable to pay a certain amount is more by way of security than because the property is transferred to him with liberty to dispose of it or withhold it. In such cases it is the true intention of the parties which must be taken into account. There can be no doubt that in this case it could never have been the intention of the receiver that the property attached should not be actually produced when the auction is to take place. If such property is not produced, the insolvent as well as the creditors may suffer, for it cannot be known beforehand what actual price would be fetched at the sale.

I dismiss the application.

Application dismissed.

APPELLATE CIVIL.

1925 December, 1.

Before Mr. Justice Boys and Mr. Justice Banerji.

SHIB NARAIN (PLAINTIFF) *v.* GAJADHAR AND OTHERS (DEFENDANTS).*

Mortgage—Three documents executed one after another between the same parties—Mashrut-ul-rahn—*Redemption—Mortgagor not entitled to redeem one without redeeming all three.*

A mortgagor sold his equity of redemption in respect of three mortgages to the son of the original mortgagee. The

* Second Appeal No. 826 of 1923, from a decree of E. Bennet, District Judge of Agra, dated the 15th of February, 1923, confirming a decree of Abdul Hasan, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 2nd of June, 1921.