

APPELLATE CRIMINAL.

Before Mr. Justice Ashworth and Mr. Justice
Cokaran Nath Misra.

EMPEROR v. DAYA SHANKAR.*

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Indian Penal Code (XLV of 1863), section 409—Misappropriation—Embezzlement—Excess Government money retained pending scrutiny of account, whether amounts to embezzlement—Public servant receiving money and not including it in the cash balance, whether amounts to misappropriation.

Held, that if a public servant in his capacity as such receives money on a certain date and does not include it in his cash balance entered in the register which he is required to maintain, there is very strong *prima facie* evidence of the money having been misappropriated on that date, and he is guilty of embezzlement if he does not hand over to his successor the money in his hands due to Government.

Where, under the rules, a public servant is required to lodge in the treasury any Government money in excess of that shown due to Government by the registers in his hands and the public servant removes the excess from the office cash-box, *held*, that he is guilty of misappropriation and it makes no difference that he removes it to a godown belonging to Government, he being not entitled to retain it pending scrutiny of the accounts.

The Government Advocate (Mr. G. H. Thomas),
for the Crown.

Mr. Hyder Husein, for the accused.

ASHWORTH and MISRA, JJ.:—This is a Government appeal from an acquittal on appeal by the Second Additional Sessions Judge of Lucknow, at Unao. The accused, Daya Shankar, was a *Naib Nazir*, officiating at the Safipur tahsil in the Unao district. He was charged under section 409 of the

* Criminal Appeal No. 9 of 1926, against the order, dated the 28th of October, 1925, of Syed Asghar Hasan, Second Additional Sessions Judge of Lucknow, at Unao, acquitting the accused-respondent.

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Indian Penal Code with having committed in his capacity of *Naib Nazir* criminal breach of trust in respect of a sum of Rs. 50-4, between the 16th of April and the 15th of June, 1925.

The facts proved against the accused and either admitted or not denied by him are as follows. On the 16th of April, while acting as *Naib Nazir*, he received by money-order a sum of Rs. 50-4 in connexion with a certain revenue case. On receipt of the money he was bound to enter it under its proper date, and under its proper serial number of receipts in register No. 4, "Account of miscellaneous receipts and payments." For the headings of this register see page 9 of the printed book. He did not so enter it until long afterwards (the precise date will remain unproved). He also did not, in his register No. 7, "Daily abstract of Nazir's accounts," include this money in the total balance of money in his hands at the end of the day. One column of this register No. 7 shows the balance that ought to be in his hands according to the several registers. In the remarks column is entered the actual amount of cash and value of postage stamps in the Nazir's possession. This column showed a total on the evening of the 16th of April, 1925, of Rs. 183-13-9 in cash as actually in the Nazir's hands. It is admitted by the accused that it should have been Rs. 50-4 more than this sum. The entry has been marked by this Court as exhibit P, and, though overlooked by the lower courts, it is, perhaps, the most important exhibit in this case. The sum of Rs. 50-4 thus received was paid out on the 7th of May, 1925, by the accused, and this disbursement was duly entered in the said register under the date of 7th of May, and under serial No. 38 of payments. The entry is exhibit F on the record. In this exhibit F, the accused entered the disbursement

as corresponding with receipt item No. 26, dated the 16th of April, 1925. The date he could get from the record of the revenue case in connexion with which the money had been received and was disbursed. The serial No. 26 he could only obtain if he had already made an entry of the receipt of this money. He himself has not stated when he made the entry of the receipt, which he ought to have made of course when the money was received. Against every entry, however, of receipt there are some columns in the middle of the page of the register No. 4 separating the items received from items paid out and in these columns are entered in the same lines as the receipt, the serial number of any payment out and the amount. Under the date of the 18th of March, we find in these middle columns reference to the amount of Rs. 50-4, and to the serial number of the payment, No. 38, i.e., exhibit F. The accused states that he made this entry when sometime in June he got notice that he was to be transferred. This entry is exhibit E. In a line with this exhibit E, there is under the same date of the 18th of March, 1925, a receipt serial No. 26 and the amount of Rs. 50-4 is entered against this number. If, therefore, the accused is speaking the truth as to the time of entering the mid-column entry, exhibit E, we may presume that he made the entry of the payment, No. 26, which is marked exhibit D, on the same date. It comes to this then, that although the accused received the money on the 16th of April, and paid out an equivalent sum on the 7th of May, he did not enter the receipt of the money until some time in June when he had notice of transfer. But two days after paying out this money, namely on the 9th of May, 1925, the accused has made a payment under serial No. 29 of payments, of Rs. 50. This is exhibit H. It will be seen that in this exhibit H the serial

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number of receipt referred to is "20" in black ink, but a tail has been faintly added to the "2" so as to make it "3". Thus, at first sight, it would read as "20," but would read "30," if the tail in red ink were drawn attention to. This disbursement was shown to be a disbursement of a portion of a receipt No. 30 of Rs. 95 received on the previous date, namely the 8th of May, and in the mid-column against this receipt is an entry that Rs. 50 of the Rs. 95 were paid out under serial No. 38 of payments. These entries as to the receipt and payment out are exhibit G. This disbursement No. 39 has, however, also been entered in the register against a receipt No. 20 of the 12th of February, 1925, of Rs. 87-1. Reference is made to payment No. 39 in the mid-column as against this receipt but the sum entered is Rs. 50-4 and not Rs. 50. This receipt and payment reference is marked exhibit M. It would, therefore, *primâ facie* appear that about the 9th of May, the accused diminished the balance appearing as due to Government according to his registers by a wrong entry that a sum of Rs. 50-4 had been paid out of a receipt of Rs. 87-1, whereas he had already entered the payment out as against another receipt number, namely No. 26 for Rs. 95. Of course this last entry would obviously invite criticism when reference was made to the serial number of payment, No. 39, because that serial number showed a payment of Rs. 50, whereas this mid-column reference to payment showed Rs. 50-4, and, if we believe the evidence, it was this discrepancy which first led to suspicion being entertained against the accused. We now come to the date when Kali Charan, the successor of the accused, arrived to take over charge, namely the 15th of June. On that date the accused handed over to Kali Charan a balance of

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Rs. 335-9-9 in cash, which he admits was Rs. 50-4 short of what was due according to the registers, if they had been kept properly, but he did not hand over the registers. On the 7th of July, 1925, the accused paid to the treasury the deficiency. Where I use the words "if they had been kept properly" I mean this. The receipt No. 26 under the date of 18th of March, 1925, of Rs. 50-4 was never shown in the total of the balance due on that date or anywhere else in the registers, and the accused admits that this was a mistake. Now on the 7th of July, the accused deposited Rs. 50 in the treasury, and gave Kali Charan four annas. This he did to make up the deficiency. The Tahsildar has stated that he did this under an order of the Collector, but the accused states that he did it of his own accord. The Tahsildar did not produce the writing or the order of the Collector, and so the lower appellate court has disbelieved him, though we see no reason to do so.

Such were the facts proved against the accused. The defence of the accused was briefly this. He was too busy to keep his accounts properly, and up-to-date. On the evening of the 16th of April, the date of the receipt of this item of Rs. 50-4, he entered in register No. 7 as the money that he had in cash, not the actual sum which he had in cash, but the sum which the registers showed (incorrectly as he admits) should have been the amount that he should have had. As to the entry of the receipt of Rs. 50-4, under the wrong date of the 18th of March, instead of the right date of the 16th of April, he explains that it was a mere mistake, there being no other receipt between the 18th of March and the 17th of April. As to his failure to total this receipt, he inferentially ascribes it to the fact that he made the entry of the receipt long after the money was actually received. He does not explain at

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all how he came to refer the payment out of the Rs. 50 under the 9th of May to two receipts, namely one of Rs. 95 received on the 8th of May, and another of Rs. 87-1 received on the 12th of February. As to his failure to hand over this sum when he paid up the balance according to his registers to Kali Charan, he states that he withheld it because he only thought it his duty to hand over the sum due to Government according to the registers. His story is that he took this money and put it in the *mal* godown where miscellaneous property is kept, intending to go through the registers, and see what sum was due to Government in excess of that handed over.

The Assistant Magistrate who tried the case found the accused guilty of having withheld the payment of this Rs. 50-4 over to his successor on the 15th of June. He held that the accused could not be deemed guilty of misappropriating the sum on the day that he received it, that is on the 16th of April, inasmuch as he paid over an equivalent sum on the 7th of May, 1925, to the person entitled to it. Hence it cannot be said that the accused misappropriated this particular item. The Second Additional Sessions Judge, on appeal, concurred in this last view. He, however, acquitted the accused on the ground that the determining factor in the case was whether, or not, the accused was short of the amount on the day when he made over charge to Kali Charan, and that, so far as the evidence went, the accused may have paid over the deficiency into the treasury before he received, if he did receive, an order to do so from the Deputy Commissioner. The Sessions Judge, therefore, considered the accused might be speaking the truth when he stated that he kept this amount in cash ready to pay over if it should be found due. As to the manipulation of the registers, whereby the balance

due to Government was reduced on paper by Rs. 50-4, he held that this only showed at the worst a preparation to defraud Government, and that there was no evidence to show that he actually did defraud Government. He accepted the statement of the accused to explain why the receipt was entered under the date of 18th of March, 1925, instead of under its proper date of 16th of April, because he said that, although the date was wrong, the place in the register was correct, there being no transaction between the 18th of March and the 17th of April.

We consider that both the courts were wrong in holding that the subsequent disbursement of Rs. 50-4, on the 7th of May, as a disbursement of a similar sum received on the 16th of April, is any answer to a charge of embezzlement of Rs. 50-4 as soon as it was received on the 16th of April. The money must have been somewhere, and the fact that the accused did not include it in his cash balance entered in the remarks column of register No. 7 on the day that it was received, is very strong *prima facie* evidence of its having been misappropriated on that date. We cannot accept the statement of the accused that his entry in the remarks column was only meant to represent the cash due to Government according to the registers. It was clearly a representation of the actual cash in hand ascertained by actual accounting. The Sessions Judge is quite wrong in accepting the explanation of the accused as to the entry of the receipt of the money under date 18th of March. He says: "As a matter of fact there is no entry for any date between the 18th of March and the 17th of April either of income or of repayment." It is correct that there is no entry between these dates of income, but there are two entries of repayment. These entries made it impossible for the entry of

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the receipt of Rs. 50-4 under the 18th of March to have been a mistake. We think that the prosecution were correct in suggesting that it was made on this date because there was room here. The Sessions Judge is again wrong in suggesting that the prosecution "had to shift the ground from this item entered as No. 26 of the 18th of March of Rs. 50-4 to two other entries in the register No. 4." This was not what the prosecution did. The prosecution always maintained that this Rs. 50-4 was misappropriated, but they cited the manipulation whereby the balance shown as due to Government was reduced in the registers by the exact amount of Rs. 50-4 as proof that this sum had been embezzled on the day that it was paid in. We accordingly are of the opinion that the proof was adequate to convict the accused of the embezzlement of Rs. 50-4 on the 16th of April.

Even if this were not the case, according to the evidence it must be held that the accused embezzled this sum on the 15th of June when he ought to have handed over to his successor the money in his hands due to Government. He cannot have really believed that, if he had money due to Government in his hands in excess of what the registers showed to be due, he was entitled to retain it pending scrutiny of the accounts. He has nowhere suggested that he kept his private money in the cash-box in his office. He must, therefore, have known that all the money in that box was the property of Government. By removing the balance, if there was any balance, which we do not believe, he would have been guilty of misappropriation. It makes no difference that he removed it to a godown belonging to Government. He failed to deal with this excess as he was bound to according to his trust. It is to be noticed that there

is a rule of Government, paragraph 1429 of volume II, Manual of the Revenue Department, that required the accused every night to deposit in the treasury any sum in excess of the hundred rupees for which he had given security. We are not concerned with judging the accused on the score of his failure to do this, but what is clear is this. This rule must have been known to the accused, and must have clearly indicated to him that it was, *a fortiori*, necessary to lodge in the treasury any Government money in excess of that shown due to Government by the registers which he might have in his hands. He himself admits that he kept the accounts very remissly. When he found that he had an excess sum, he was bound, therefore, to suspect that the registers were wrong, but it passes our imagination how he could think that he was entitled to retain the money for one moment.

The accused produced the evidence of two *chaprasis* to show respectively that when he handed over to his successor on the 15th of June the sum of Rs. 335-9-9 in cash, he also removed from the box another Rs. 200 and that this sum was removed again from the *malkhana* and taken to the treasury. The evidence of these *chaprasis* is open to doubt as they were not likely to have seen this, and moreover in his statement under examination the accused never specified this amount as being Rs. 200. It may be remarked, however, that the trial court should have enquired of the accused what the excess amount in his office cash-box was, and should also have asked the witness Kali Charan what was the other money besides Rs. 50-4 which was handed over by the accused to him as "deficiency" on the 7th of July. If these questions had been asked the defence of the accused would have been rendered more definite. At

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the same time we hold that the accused has entirely failed to explain his failure to credit Government with this sum either on the date of its receipt or when he gave over his balance. It is possible that the accused borrowed this money on the 16th of April intending to replace it, but that he was not in a position to do so until after the 15th of June, with the consequence that the embezzlement was discovered. It does not appear that he embezzled any other amount.

For the above reasons, we allow this appeal and restore the judgement of the first court. We find the accused guilty of an offence under section 409 of the Indian Penal Code and sentence him to six months' rigorous imprisonment. The accused will surrender himself to the District Magistrate of Unao for serving this sentence.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza.

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RAM PRASAD, MINOR, UNDER THE GUARDIANSHIP OF JAI JAI RAM (DEFENDANT-APPELLANT) *v.* KHUSAL SINGH (PLAINTIFF-RESPONDENT).*

Contract Act (IX of 1872), section 16—Mortgage—Interest, court's power to reduce—Undue influence—Dominate the will of another, position of a party to.

Held, that a court has no power to reduce the contracted rate of interest solely on the ground that it is hard, excessive, extortionate and unconscionable apart from any question of undue influence or fraud. A party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will.

* Second Civil Appeal No. 373 of 1925, against the decree, dated the 28th of April, 1925, of Saiyid Khurshed Husain, Subordinate Judge of Hardoi, affirming the decree, dated the 30th of April, 1924, of Saiyid Abid Raza, Munsif of Sandila, decreeing the plaintiff's suit for redemption.