

open to the aggrieved party, as by virtue of section 47 a separate suit is barred.

For the reasons given we hold that an objection under section 47, Civil Procedure Code, cannot be taken after confirmation of the sale. We, therefore, accept this appeal, set aside the order of the lower Appellate Court and restore the order of the executing Court dismissing the application. The parties will bear their own costs throughout.

A. N. K.

Appeal accepted.

APPELLATE CRIMINAL.

Before Skemp and Ram Lall JJ.

THE CROWN—Appellant,

versus

SULTAN MAHMUD—Respondent.

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August 17.

Criminal Appeal No. 279 of 1938.

Indian Penal Code (Act XLV of 1860), S. 409 — Lambardar realising land revenue from land owners and not remitting the same to Government — Whether guilty of the offence of Criminal breach of trust.

A lambardar realized moneys from land owners in respect of land revenue due from them to Government and instead of paying the amount so received for land revenue into the Government Treasury he utilised it for his own purposes. It was not denied by him that the money was received by him and that it was his duty to remit the same to Government. The Sessions Judge acquitted him on the ground that he was not criminally liable.

Held (setting aside the order of acquittal) that the lambardar was guilty of the offence of criminal breach of trust within the meaning of s. 409, Indian Penal Code, as he was entrusted with money and he dishonestly converted it to his own use in violation of the directions of law prescribing the mode in which such trust was to be discharged.

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Said Ahmad v. Emperor (1), dissented from.
Nripendra Nath Das v. Emperor (2), distinguished.

Appeal from the order of Lala Gulwant Rai, Sessions Judge, Attock at Campbellpore, datted 22nd December, 1937, reversing that of Sheikh Ala-ud-Din Arshad, Additional District Magistrate, Attock at Campbellpore, dated 20th November, 1937, and acquitting the respondent.

R. C. SONI, for Advocate-General, for Appellant.
Nemo, for Respondent.

RAM LALL J.

RAM LALL J.—Sultan Mahmud, son of Khushal Khan, who is a Lambardar in village Abdal in the Attock district, was charged under section 409 of the Indian Penal Code, with having embezzled a sum of Rs.146-8-9 by a Magistrate of the first class and convicted and sentenced to six months' rigorous imprisonment and a fine of Rs.150. The allegation was that this sum of Rs.146-8-9 had been realised by him from the various land owners in his *patti* between the 19th June and the 23rd July, 1937, in respect of land revenue due from these land owners to Government. Sultan Mahmud instead of paying the amount so received for land revenue into the Government treasury utilised it for his own purposes and, when put on his trial, it was urged on his behalf that his mind had become unhinged and that he had given away the money in question to *syeds* and *fakirs*.

From his conviction Sultan Mahmud appealed to the Sessions Judge who, by his order, dated the 22nd December, 1937, acquitted him. The order of the lower Court is based on a decision of the Additional Judicial Commissioner, Peshawar, *Said Ahmed v. Emperor* (1), in which it is held that the position of a Lambardar is not that of a trustee and that, therefore,

(1) (1937) 33 Cr. L. J. 530.

(2) 1928 A. I. R. (Cal.) 321.

if he does not hand over to Government the money recovered by him from the land owners on account of land revenue, he is not liable criminally, but the only remedy of Government is of a civil nature.

Against this order of acquittal, the Punjab Government have preferred an appeal under section 417 of the Criminal Procedure Code, and Mr. R. C. Soni has appeared on behalf of the learned Advocate-General. Notice was issued to the respondent by this Court on the 29th of March, 1938, and a notice of the date of hearing was subsequently personally served on him. Notwithstanding this, however, the respondent has failed to appear before this Court at the hearing either personally or through counsel. The report of the Tahsildar is that he has got means to engage a counsel if he chooses to do so and, in these circumstances we have heard the learned counsel for the Crown and have no option but to decide the appeal in the absence of the respondent.

It is not denied that money was received by the accused respondent and that it was his duty to remit the same to Government. The sole question on these admitted facts is whether the status of a Lambardar excludes criminal liability in respect of land revenue collections and the only basis for the acquittal being the decision of the Peshawar Court referred to above, the discussion will eventually resolve itself into an examination of the reasons on which that decision rests.

Criminal breach of trust is defined in section 405 of the Indian Penal Code, which is in the following terms :—

“Whoever being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use

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that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits 'criminal breach of trust'."

It appears to me to be obvious that when money was paid to the Lambardar by the land owners it was paid in discharge of a liability of these land owners to Government for land revenue then due. When therefore this money was paid, there was an implied direction that it should be paid to Government on behalf of the land owners in discharge of their specific liabilities, and the Lambardar received these sums as an agent of Government with an implied promise that the money would be utilized for the purpose for which it was paid. That in this manner a Lambardar acts as an agent of Government is proved by the fact that once a landowner has proved payment to the Lambardar, his liability is extinguished and it is then not open to Government to claim a fresh payment if the Lambardar neglects or omits to pay the money to the Government. Further, section 97 of the Punjab Land Revenue Act enacts that when a Lambardar satisfies a revenue official that the land revenue has not been paid to him, he can recover the same by summary process as an arrear of land revenue from the land owners and not from the Lambardar. It appears to me therefore that there is an entrustment when the money is paid, and if the money is converted to his own use by a Lambardar he commits a breach of that trust. On receipt of the money a legal duty is cast on the Lambardar to deposit it in the Government Treasury. There being an implied contract that the

money will be so paid, by his omission to do so the Lambardar not only violates that contract but also the directions of law prescribing the mode in which the trust is to be discharged. Apart from judicial authority therefore it seems to me to be clear on a consideration of general legal principles that the accused respondent is clearly guilty of an offence under section 409 of the Indian Penal Code.

The main grounds on which the reported Peshawar case rests are (1) that Government has the right to recover the demand whether the Lambardar has received it or not, and (2) that the recovery from the Lambardar is by summary process and apparently because this remedy is specifically granted by the Act and the rules made thereunder, other remedies are excluded. In other words it is held that it is the duty of the Lambardar to pay the land revenue demand and inasmuch as there are ample provisions in the Land Revenue Act to make him pay this demand to Government, his position becomes somewhat that of a lessee—a person who is under a contractual liability only and therefore not criminally liable. In this connection the learned Additional Judicial Commissioner has quoted "*Nripendra Nath Das v. Emperor*" (1), in support of his finding.

The position of a Lambardar is that it is his duty to collect and pay the land revenue to Government. If he fails in his duty to collect, Government has the right, by virtue of the rules framed by the Financial Commissioners under the Land Revenue Act, to be indemnified for the Lambardar's neglect and the provisions of section 97 of the Land Revenue Act are intended to give the Lambardar every chance of getting

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land owners to pay what is due from them. It may be that a man cannot be held guilty for having embezzled a sum of money which never came into his hands and therefore it may be correct that in respect of monies which a Lambardar wilfully or negligently omits to collect he is liable only on the civil side, but in so far as monies which have actually come into his hand with an implied direction to deal with them in a particular way are concerned, there can, in my opinion, be no question that he is criminally liable if he wilfully misappropriates. In every case in which property belonging to one man is stolen by another there is a dual remedy. Theft or embezzlement is an offence against society and punishable under the Penal Code. It is also a tort and is a very good basis for a civil action. The only difference between the remedy which a private person may enforce against a thief or a fraudulent agent and Government enforcing the civil liability of a Lambardar who has received money on their behalf and has not paid is that a private person has to bring a regular civil suit if the property stolen or embezzled is not restored to him under the provisions of the Criminal Procedure Code, such as section 517, whereas Government have been granted a special remedy of enforcing its civil rights by summary process and recovering the same as arrears of land revenue. Government has possibly another advantage of recovering summarily from a fraudulent agent not only monies which have actually come to the hand of that agent on behalf of Government, but also monies which Government cannot recover from the original debtors because of the neglect or dishonesty of the agent. It seems to me that the learned Additional Judicial Commissioner has focussed his attention only on the civil remedies and has ignored the other side of

the problem. A crime is an offence against society and has little or nothing to do with the rights in the stolen property of individuals. Government act on behalf of organized societies when enforcing a criminal remedy but when Government themselves stand in the position of a private person whose property has been stolen or embezzled, the exercise of the civil right of recovery by Government does not preclude the criminal remedy.

I am totally unable to see how a Lambardar becomes a lessee or has the status analogous to that of a lessee. In the Calcutta case reported as *Nripendra Nath Das v. Emperor* (1), there was a definite *kabuliyat* executed in favour of Government and it was stipulated in that document that if the executant failed to deposit the rent within one month's time fixed, Government would be competent to realise from him or his sureties the said sum as arrears of rent. In view of this contract a criminal liability could be enforced in that case no more than it could be by a landlord whose tenant omitted or refused to pay the rent due, and I fail to see, therefore, how the Calcutta case can be of any help in this matter.

The learned Additional Judicial Commissioner has laid considerable stress on the fact that no ruling of any High Court was cited before him in support of the allegation that a Lambardar in such circumstances could be successfully prosecuted. The learned Sessions Judge in acquitting the accused respondent has actually quoted the observations of the learned Additional Judicial Commissioner on this point as a basis of his decision. I am unable to see any force in this line of argument and, in my opinion, it can be urged with

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equal force that the law is so clear and the Lambardars in this country are so well aware of their responsibility that the question of criminal prosecution has not arisen because the offence has not been committed. But even if the offence has been committed with impunity on any number of occasions in the past, that is no reason why when it is detected and brought before a Court, it should not be dealt with on its own merits. If the observations of the learned Additional Judicial Commissioner on this point, quoted as they are with approval by the learned Sessions Judge, Attock, are allowed to go unchallenged, I fear that the offence of embezzlement in such circumstances as these might tend to increase rapidly and so lead to very considerable administrative difficulties.

For the above reasons I am unable, with very great respect, to agree with the *ratio decidendi* of the Peshawar case and would hold, therefore, that the accused respondent is clearly guilty of an offence under Section 409 of the Indian Penal Code.

The question of sentence in a case like this is not one without difficulty. The trying Magistrate inflicted a sentence of six months' rigorous imprisonment and Rs.150 fine. This sentence would be wholly inadequate in ordinary circumstances, but having regard to the fact that there is some evidence that the respondent has developed some mental peculiarities, that he is a very young man and that the institution of proceedings after acquittal by the learned Sessions Judge must have involved considerable mental worry, I would set aside the acquittal and restore the sentence passed by the learned Magistrate in the first instance.

SKEMP J.

SKEMP J.—I concur in the order proposed by my learned brother. In my opinion the facts proved in

this case fall within the definition given in section 405, Indian Penal Code. With all respect I am unable to understand the view of the law taken by the learned Additional Judicial Commissioner in *Said Ahmad v. Emperor* (1). It is quite irrelevant that there is against the Lambardar not only a criminal but also a civil or a special remedy. In my opinion *Nripendra Nath Das v. Emperor* (2) can be distinguished. The present is a typical case where money is paid by revenue payers to a Lambardar for payment into the Government treasury and he fails to make the payment. It seems to me manifest that he has been entrusted with property and that he has dishonestly misappropriated it.

(The remainder of the judgment is not required for the purpose of this report. *Ed.*).

A. N. K.

Appeal accepted.

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