

Ahmed (1) in which it is said: "We think it may be gathered from these decisions that where a judgment-debtor applies to have an execution sale set aside, alleging circumstances which, if found in his favour, would amount to fraud on the part of the decree-holder or the auction-purchaser, the case comes within section 244." As to this we would say, *firstly*, that we do not think the learned Judges who decided that case meant to lay down that a mere allegation of fraud without an attempt to prove it would be sufficient to bring the case under section 244. They must have meant that allegations of fraud supported by evidence of some sort would do so. *Secondly*, if this be what they meant, then it is not supported by the cases referred to by them, in all of which an endeavour was made to prove the acts of fraud alleged. *Thirdly*, the observation is at the best but an *obiter dictum*, for, in the case in which it occurs, it was held that the act alleged to be fraudulent did not amount to fraud, and that consequently no second appeal lay.

1900

UMAKANTA
ROY
v.
DINO NATH
SANYAL.

This appeal is accordingly dismissed with costs. The order in this case also governs appeal from Order No. 23 of 1900.

M. N. R.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Princep and Mr. Justice Handley.

KALI PROSAD MAHSAL AND ANOTHER (PETITIONERS), v. QUEEN-
EMPRESS (OPPOSITE PARTY.)^a

1900
July 2.

Criminal Proceedings—Irregularity in Proceedings—Misjoinder of parties—Joint-trial on charges of Criminal breach of trust by carrier and Receiving stolen property—Objection taken for first time in Revision—Code of Criminal Procedure (Act V of 1908) ss. 233 and 537—Penal Code, ss. 407 and 411.

K S, *K P*, and *K M* were tried jointly and convicted: *K S* under s. 407 of the Penal Code, *K P* and *K M* under s. 411 of that Code. No

^a Criminal Revision No. 531 of 1900, made against the order passed by E. G. Drake-Brockman, Esquire, Sessions Judge of Midnapur, dated the 18th of June 1900.

1900
 KALI PROSAD
 MAHISAL
 v.
 QUEEN-
 EMPRESS.

objection to the joint-trial was taken either before the trying Magistrate or before the Appellate Court. *Held*, in revision (upon objection being taken to the joint trial of *KS* with *KP* and *KM*) that a misjoinder of parties is not fatal to the proceedings, but is an irregularity which requires that the Court should consider under the terms of s. 537 of the Code of Criminal Procedure whether it has in fact occasioned a failure of justice. *In the matter of Abdur Rahman (1)* followed.

Held further that having regard to the explanation to s. 537 of the Code of Criminal Procedure the objection was not one which could be properly taken in revision; that the objection should have been raised at an earlier stage of the proceedings; and that therefore it might be taken that not having been so raised it had not in fact occasioned a failure of justice.

IN this case the accused Khatu Shaha was entrusted with a large and valuable cargo by the complainant Hira Lal Lala for the purpose of carrying it from Calcutta to Contai. Khatu Shaha failed to do so and reported that his boat had sunk near Ulubaria, and the whole cargo had been lost. He had however transhipped the cargo at Ulubaria to another boat, from which it was again transhipped at Gaonkhali to the boat of the accused Kali Prosad Mahisal, and eventually brought to Dahagora Ghat, a short distance from Contai. Then instead of making it over to the complainant it was misappropriated, and a portion of it recovered by the Police. Some portion was found in the house of the accused Karunakar Maiti, another portion hidden in a *khal* near the accused Kali Prosad Mahisal's house, and another portion in his boat, while a boatman of his was caught taking away certain articles. A large portion of the cargo was never recovered or accounted for by Khatu Shaha. The three accused were tried jointly by the Deputy Magistrate of Contai, and were on the 31st May 1900 convicted—Khatu Shaha under s. 407 of the Penal Code and sentenced to eighteen months' rigorous imprisonment, Kali Prosad Mahisal under s. 411 of the Penal Code and sentenced to nine months' rigorous imprisonment, and Karunakar Maiti under s. 411 of the Penal Code, and sentenced to six months' rigorous imprisonment.

The accused appealed to the Sessions Judge of Midnapore, who, on the 18th June 1900, dismissed their appeal.

Neither before the Deputy Magistrate nor in the Appellate Court was any objection taken to the joint-trial of Kali Prosad Mahisal and Karunakar Maiti with Khatu Shaha.

Babu *Horendra Nath Mitter* for the petitioners.

1900, JULY 2. The judgment of the Court (PRINSEP and HANDLEY JJ.) was delivered by

PRINSEP, J.—Two points are taken in this application for revision. It is first contended that there has been a misjoinder of parties, and that, therefore, the trial is bad. In the next place it is contended that, on the facts found, the Sessions Judge should not properly have convicted the petitioners under s. 411, Indian Penal Code, of dishonestly receiving and retaining as stolen property, this property which had been taken by criminal misappropriation, knowing it to be such.

Now, in regard to misjoinder, it has been recently held by a Full Bench in *In the matter of Abdur Rahman* (1) that misjoinder of charges is not fatal to the proceedings, but that it is an irregularity which requires that the Courts should consider under the terms of s. 537 Code of Criminal Procedure, whether it has in fact occasioned a failure of justice. The same rules, we think, should apply to a case of misjoinder of parties, as in the present case, and we may observe, in respect of this case, that neither before the Magistrate nor in the Appellate Court was any objection taken to the joint-trial of these two petitioners before us, together with another man who was charged only with criminal misappropriation. We think, therefore, that this is not an objection which can be properly taken before us, for, to use the words of the explanation to s. 537 Code of Criminal Procedure, it could and should have been raised at an earlier stage of the proceedings, and, therefore, we may take it that, not being so raised, it has not in fact occasioned a failure of justice.

In respect of the other objection we think that there are ample grounds shown in the judgment of the Sessions Judge for convicting the petitioners under s. 411. The application is, therefore, refused.

D. S.

Application rejected.

(1) (1890) I. L. R. 27 Calc., 839.

1900

KALI PROSAD
MAHISAL

v.

QUEEN-
EMPRESS.