

APPELLATE CRIMINAL

Before Khosla, J.

KULDIP SINGH,—Convict-Appellant

versus

THE STATE,—Respondent

Criminal Appeal No. 139 of 1954

1954
 Sept. 20th

Indian Penal Code (Act XLV of 1860)—Section 409—Criminal breach of trust or misappropriation—Whether can be in respect of immovable property—Trustee—Whether an exception—Code of Criminal Procedure (Act V of 1898)—Section 403—Conviction for a second time for the same act although under a different section of Penal Code—Whether permissible.

(1) A.I.R. 1954 Lah, 696

Held, that a person cannot be convicted of criminal breach of trust or misappropriation in respect of immovable property. Misappropriation occurs only when the property is converted to the use of the offender or is disposed of. In the case of movable property title passes with delivery. In the case of immovable property, however, no title can pass to the alienee if the alienor has no title in it and, therefore, the original owner can always get his property back without any loss to himself. The case of a trustee would perhaps rest on a different footing because a trustee has full authority to alienate property, but in that case it may be argued that it is the sale-proceeds which are being misappropriated and not the property itself.

Held, that the appellant, on the same facts, was convicted of an offence under section 420 of the Indian Penal Code and for the same act he cannot be convicted again for an offence under section 409 of the Indian Penal Code, on the principle that no one can be convicted of the same offence twice, as embodied in section 403 of the Code of Criminal Procedure and Article 20 of the Constitution of India.

Chandan Lal v. Emperor (1), *Jugdawn Sinha v. Queen-Empress* (2), *Reg v. Girdhar Dharamdas* (3), *U. Ka Doe v. Emperor* (4), *Natesa Mudaliar v. Srinivasalu Naidu* (5), relied on.

Appeal from the order of Shri V. P. Malhotra, Special Magistrate, 1st Class, with Section 30 powers, Ambala, dated the 12th February, 1954, convicting the appellant.

H. L. SIBAL and K. S. THAPAR, for Appellant.

K. S. CHAWLA, Assistant Advocate-General, for Respondent.

JUDGMENT

KHOSLA, J. This is an appeal from an order of Mr. V. P. Malhotra, Special Magistrate, Ambala, convicting the appellant under sections 409 and 477-A, Indian Penal Code and sentencing him to five years' rigorous imprisonment upon the first charge and to two years' rigorous imprisonment on the second charge. The two sentences have been ordered to run consecutively.

Khosla, J.

(1) A.I.R. 1926 Lah. 478
 (2) I.L.R. 23 Cal. 372
 (3) 6 Bom. H.C. (Cr.) 33
 (4) A.I.R. 1930 Rang. 158
 (5) 1922 Mad. Weekly Notes 1853

Kuldip Singh
v.
The State

Khosla, J.

The facts which have given rise to this case are briefly as follows. The appellant Kuldip Singh was the sole proprietor of a concern known as the Kuldip Chemical and Oil Mills, and a limited liability company in which Kuldip Singh was a shareholder was formed and this company acquired all the assets and liabilities of the original Oil Mills. The assets included an area of land forming part of two *khasra* numbers 1241 and 1244. The relevant area was 1 *bigha* 10 *biswas*. After the consolidation of holdings the new *khasra* numbers assigned to this area were 1/485 and 1/486. Each of these *khasra* numbers was approximately 13 *biswas* in area and the two *khasra* numbers together therefore measured 1 *bigha* 10 *biswas*. This land, as I have already observed, was acquired by the limited liability company which was known as Kuldip Oil Industries Limited. Kuldip Singh had received full consideration for all the assets of the old firm including this land. The land has two previous charges upon it, one created in favour of Amar Singh who is a cousin of the appellant and the other in favour of Janki Das. These charges were created before the transfer of the property in favour of the Kuldip Oil Industries Limited. After this the appellant agreed to sell the two *khasra* numbers measuring 1 *bigha* 10 *biswas* in favour of Moti Parshad. He represented to Moti Parshad that the land belonged to him exclusively and was wholly unencumbered. Moti Parshad accordingly agreed to buy it for a sum of Rs. 4,000. The agreement to sell was executed on the 10th June, 1948, and on this date a sum of Rs. 2,000 forming part of the purchase price was paid to the appellant. The sale-deed was to be executed within a year of this agreement. The sale-deed was in fact executed on 24th April, 1949 and the balance of Rs. 2,000 was paid. When it became known that the appellant had sold land which in fact belonged to

the Kuldip Oil Industries Limited, proceedings against him were started in the Court of a Magistrate under section 409, Indian Penal Code. The challan was put into Court in July, 1950. The case remained pending for a considerable time partly because of a number of transfer petitions moved by the appellant. Moti Parshad now came to know that the land was not previously unencumbered but that it had two charges upon it. He thereupon filed a complaint against Kuldip Singh under section 420, Indian Penal Code, accusing him of having cheated him of a sum of Rs. 4,000. There was also a civil suit by Amar Singh for the realization of his mortgage money by the sale of the mortgaged property. The case under section 420 resulted in the appellant's conviction. The case under section 409 proceeded and finally the appellant was convicted and sentenced as stated above.

Kuldip Singh
v.
The State
Khosla, J.

The facts in this case were not challenged before me and there can be no doubt that the appellant representing to Moti Parshad that (a) the land was unencumbered and (b) it belonged to him exclusively prevailed upon Moti Parshad to buy it and pay Rs. 4,000 to him. In respect of this transaction the appellant was convicted and sentenced under section 420, Indian Penal Code. The question raised in the present appeal, however, is that the appellant cannot be convicted under sections 409 and 477-A, Indian Penal Code, because (a) there can be no misappropriation of immovable property as defined by section 405, Indian Penal Code, and (b) the appellant cannot be convicted a second time for the same act and that his present conviction is bad both because of the provisions of section 403, Criminal Procedure Code, and Article 20 of the Constitution.

Kuldip Singh
 v.
 The State
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 Khosla, J.

It is perhaps a somewhat broad proposition to state that nobody can be convicted of misappropriation in respect of immovable property although not a single case was cited at the Bar in which a person was convicted of misappropriating land or a house. The reason appears to be that misappropriation occurs only when the property is converted to the use of the offender or is disposed of. In the case of movable property title passes with delivery. In the case of immovable property, however, no title can pass to the alienee if the alienor has no title in it and, therefore, the original owner can always get his property back without any loss to himself. The case of a trustee would perhaps rest on a different footing because a trustee has full authority to alienate property, but in that case it may be argued that it is the sale-proceeds which are being misappropriated and not the property itself. It may be that that is why there is no reported case of a person having been convicted of misappropriating immovable property. Indeed, there are one or two cases in which it has been held that there can be no criminal breach of trust in respect of immovable property. *Chandan Lal v. Emperor* (1), was a case relating to the alleged criminal breach of trust in respect of a house. Martineau, J., quashing the charge framed by the Magistrate under section 406, Indian Penal Code, referred to *Jugdown Sinha v. Queen-Empress* (2). The allegation in that case was that Jugdown Sinha had committed an offence under section 408, Indian Penal Code, in respect of certain plots of land. A Division Bench of the Calcutta High Court held "that the property referred to in section 405 of the Indian Penal Code must, as in section 403, be movable property, and that * * * * criminal breach of

(1) A.I.R. 1926 Lah. 478

(2) I.L.R. 23 Cal. 372

trust cannot be committed in respect of immovable property." The Judges referred to an earlier ruling of the Bombay High Court, *Reg. v. Girdhar Dharamdas* (1). In *U Ka Doe v. Emperor* (2), a person was convicted of criminal breach of trust in respect of some teak trees. It was held that the teak trees were immovable property and no criminal breach of trust in respect of them could have been committed. The convict in that case was a Range Officer and growing teak trees were entrusted to him. In *Natesa Mudaliar v. Srinivasalu Naidu* (3), Pakenham Walsh, J., of the Madras High Court considered this matter, and although he declined to set aside the conviction of the petitioner he observed that he did not think it necessary to give any definite opinion on the question as to whether immovable property can be the subject of an offence under section 405, Indian Penal Code.

Kuldip Singh

v.

The State

Khosla, J.

It seems to me therefore that the weight of authority is in favour of the view that a person cannot be convicted of criminal breach of trust in respect of immovable property. A possible exception may, as I have observed above, arise when the offender is a trustee, but in that case it will probably be argued that he committed criminal breach of trust in respect of the sale-proceeds and not of the property. In the present instance the appellant was not a trustee. He did not purport to sell the property as a trustee or agent of the Kuldip Oil Industries Limited and in the circumstances I am clearly of the view that he cannot be convicted of the offence punishable under section 409, Indian Penal Code.

(1) 6 Bom. H.C. (Cr) 33

(2) A.I.R. 1930 Rang 158

(3) 1932 Madras W.N. 1353

Kuldip Singh
v.
The State

Khosla, J.

There is, however, another ground on which this conviction must be set aside, namely the principle that no one can be convicted of the same offence twice. The present conviction is based upon the transaction of sale in favour of Moti Parshad. Moti Parshad took action against the appellant and the appellant was convicted of the offence of cheating under section 420, Indian Penal Code. The allegation of Moti Parshad at that time was that the appellant had falsely misrepresented himself to be the exclusive owner of the land sold and as a result of this misrepresentation had obtained from him (Moti Parshad) a sum of Rs. 4,000. This same transaction is the basis of the present prosecution. It may be that a charge under section 409, Indian Penal Code, in the alternative could have been framed against the appellant on the previous occasion, but I am quite definite that there can be no second prosecution after the first case has resulted in conviction. It was argued by the learned Assistant to Advocate-General that subsection (3) and subsection (4) of Section 403 would cover the appellant's case. He contended that at the time of the previous prosecution it was not known that the appellant had also committed criminal misappropriation in respect of property belonging to the Kuldip Oil Industries Limited. This argument is untenable. Criminal misappropriation was not a consequence which had not till then happened, nor was it a consequence which was not known to the Court to have happened. Indeed, the case under section 420, Indian Penal Code, was based on the allegation that the property belonged to the Kuldip Oil Industries and not to the appellant personally. Therefore subsection (3) clearly does not apply. With regard to subsection (4) it was contended that the offence under section 409,

Indian Penal Code, is punishable with transportation for life, whereas the offence under section 420, Indian Penal Code, is punishable with imprisonment for a maximum period of seven years only. Schedule II of the Criminal Procedure Code, however, makes it quite clear that the charge under section 409, Indian Penal Code, is triable by a magistrate of the first class, and, therefore, the offence of which the appellant has now been convicted could have been enquired into by the same Court which convicted him of the offence under section 420, Indian Penal Code. Subsection (4) therefore too does not apply.

Kuldip Singh
v.
The State
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Khosla, J.

The learned counsel for the appellant also drew my attention to Article 20 of the Constitution and contended that subsection (3) of section 403, Criminal Procedure Code, was *ultra vires* the Constitution. It is, however, not necessary to go into this matter, and it is clear to me that under the ordinary law and according to the provisions of the Criminal Procedure Code the appellant could not have been convicted of criminal misappropriation because he was convicted in respect of the same offence previously.

This appeal must therefore succeed and allowing it I set aside the convictions and sentences of the appellant and acquit him.