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repairs have actually been effected by the mortgagee, he can claim the amount so spent by him. He cannot, however, claim anything for the additions and alterations made in the property in dispute. He has, however, been allowed Rs. 2,700 against which no cross-appeal or cross-objections have been filed. It was not suggested by the learned counsel that on repairs he could have spent more than this amount.

In view of the above, we find that the appellant has already got more than what was due to him and there is no merit in this appeal, and we dismiss the same with costs.

B.R.T.

SUPREME COURT.

Before Bhuvaneshwar Prasad Sinha, Chief Justice and Syed Jafer Imam, J. L. Kapur, K. N. Wanchoo and K. C. Das Gupta, JJ.

K. SATWANT SINGH,—*Petitioner.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Criminal Appeals 100 to 105 and 124 to 129 of 1954 with Petition No. 31 of 1952.

1959

Oct., 28th

Code of Criminal Procedure (Act V of 1898)—Section 188—Offence of Cheating—Misrepresentation made at Simla—Cheque in pursuance of misrepresentation sent by post from Kolhapur (a place outside British India) to Lahore on a bank at Lahore—Place of delivery of the cheque—Whether the place where posted or the place where delivered—Trial without certificate of Political agent or Provincial Government—Whether legal—Section 197—Public servant abetting offence of cheating—Whether sanction for his prosecution necessary—Sections 233 to 239—Person charged with three offences of cheating at one trial and his co-accused charged with abetments of those

offences—Joint trial—Whether legal—Criminal Law Amendment Ordinance (XXIX of 1943)—Section 10—Fine imposed under—Whether legal—Constitution of India (1950)—Article 20 and Indian Penal Code (XLV of 1860)—Section 63—Effect of.

The appellant was charged with the offence of cheating for filling certain false claims before the Government of Burma at Simla. Those claims were certified as true by Henderson, the co-accused, at Jhansi. The payment was made by cheques posted from Kolhapur (a place outside British India) to Lahore on a bank at Lahore. The cheques were received and cashed by the appellant at Lahore. It was urged that the delivery of the cheques was made at Kolhapur and the offence of cheating was committed at Simla and Kolhapur and as no certificate of the Political Agent or the sanction of the Provincial Government had been obtained as required under Section 188 of the Code of Criminal Procedure, the trial was illegal. The other arguments raised were that Henderson was a public servant removable by the Governor-General in Council and as no sanction had been obtained under section 197 of the Code of Criminal Procedure, the joint trial was vitiated, that the appellant and Henderson could not be tried together in one trial for three offences of cheating committed by the appellant and for abetment of those offences committed by Henderson in view of the provisions of Sections 233 to 239 of the Code of Criminal Procedure.

Held, that the misrepresentation by the appellant was at Simla and the false certification of the claims as true by Henderson at Jhansi. The appellant was paid at Lahore at his own request by means of cheques on the branch of the Imperial Bank of India at Lahore. The delivery of the property of the Government of Burma, namely, the money, was made at Lahore, a place in British India, and not at Kolhapur, from where the cheques were posted and, therefore, no part of the offence of cheating was committed at Kolhapur. As the offence committed by the appellant was not at a place beyond British India, there was no need for the existence of a certificate of a Political Agent or, in the absence of such a person, a sanction of the Provincial Government.

The provisions of Section 188 of the Code of Criminal Procedure did not apply to the facts of this case and the trial was legal.

Held, that where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences. Such being the position, the provisions of section 197 of the Code are inapplicable and no sanction was necessary for the prosecution of Henderson.

Held, that Section 239 of the Code of Criminal Procedure permits the joinder of persons in a single trial in the circumstances mentioned in clauses (a) to (g). The general rule that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately has no application to these clauses. Indeed section 233 contemplates that and expressly excludes the application of its provisions to section 239. The entire tenor of the provisions of section 239 indicates that several persons can be tried together for several offences committed in the circumstances mentioned therein. According to clause (b) of Section 239 in one trial any number of persons can be tried for a single offence along with any number of persons accused of abetment of that offence. Having regard to the provisions of Section 13 of the general Clauses Act, the singular includes the plural and it would not be straining the language of the clause if the same was construed also to mean that persons accused of several offences and persons accused of abetment thereof could be tried together at one trial. So construed, framing of three charges under section 420, Indian Penal Code, against the appellant and three charges of abetment against Henderson in the same trial did not infringe the provisions of clause (b) of section 239 of the Code of Criminal Procedure.

Held, that section 10 of the Criminal Law Amendment Ordinance, XXIX of 1943, directs the imposition of a minimum sentence of fine. This provision cannot be said to be prohibited by Article 20 of the Constitution of India.

What is prohibited under Article 20 of the Constitution is the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The total sentence of fine ——"ordinary" and "compulsory"—in the present case cannot be said to be greater than that which might have been imposed upon the appellant under the law in force at the time of the commission of the offence, because the fine which could be imposed upon him under section 420, Indian Penal Code, was unlimited.

Appeals from the Judgment and Order, dated the 2nd August, 1954, of the Punjab High Court in Criminal Appeals Nos. 112 of 49, 333, 382, 383 and 410 of 1950 and 241 of 1951 arsing out of the Judgment and Order, dated the 26th June, 1950 of the Punjab Special Tribunal.

For the Appellant in Cr. As. Nos. 100 to 105 of 1954, Petitioner in Petition No. 31 of 52 and Respondent in Cr. As. Nos. 124 to 129 of 1954: Mr. Harnam Singh, Senior Advocate, (M/s Hardyal Hardy and P.C. Aggarwala, Advocates, with him).

For the Respondents in Cr. As. Nos. 100 to 105 of 1954 and Petition No. 31 of 1952 and Appellant in Cr. As. Nos. 124 to 129 of 1954: Mr. C. K. Daphtary, Solicitor-General of India, (M/s. Kartar Singh Chawla, T. M. Sen and D. Gupta, Advocates, with him).

JUDGMENTS

The following Judgments of the Court were delivered by

IMAM, J.—These appeals are on a certificate granted by the Punjab High Court and they have been heard together as they arise out of a single judgment of the High Court. In Criminal Appeals Nos. 100 to 105 of 1954 Satwant Singh is the appellant and in Criminal Appeals Nos. 124 to 129 of 1954 the State of Punjab is the appellant. Imam, J.

Although in these appeals only questions of law have been urged it is necessary to set out briefly some of the facts which led to the prosecution and conviction of Satwant Singh. As a result

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of the Japanese invasion of Burma in 1942 the Government of Burma and the Allied forces stationed there were compelled to leave that country. In connection with the evacuation from Burma and the defence of that country, the Government of Burma and the army had to execute certain works such as the construction of roads, repairs and construction of bridges, strengthening and repairing of old tracks and converting railway lines into motor roads. Some of these works were executed by the army and some were entrusted to contractors.

After evacuation of Burma its Government was located at Simla. In August, 1942 the Government of Burma advertised inviting claims from contractors who had executed works or had supplied materials in Burma and had not yet been paid. Satwant Singh had worked as a contractor in Burma. He at first submitted a claim for a sum of a little over Rs. 18,000. Later on, he put in further claims the total amount of which ran into several lakhs of rupees. These claims were sent by the Government of Burma to Major Henderson at Jhansi in March and May, 1943 for verification as he was the officer who had knowledge of these matters. This officer certified many of these claims to be correct and sent the papers back to Simla. He did not pass one claim because it was within the knowledge of another officer Mr. Nasee. On the certification of the claims by Henderson, the Finance Department of the Government of Burma sanctioned the same and the Controller of the Military Claims at Kolhapur was directed to pay the amounts sanctioned. On the request of Satwant Singh cheques drawn on the Imperial Bank of India at Lahore were posted to him from Kolhapur and these cheques were encashed at Lahore. In all Satwant Singh was paid Rs. 7,44,865-12-0.

Subsequently, suspicions of the Government of Burma were aroused concerning the many claims made on it and it was discovered that many of them, including some of those of Satwant Singh, were false. A police investigation followed which revealed that a large number of claims made by various persons including Satwant Singh in respect of works done for the benefit of the army were false. Satwant Singh was arrested on the 12th of April, 1944, at Ambala and was taken to Lahore. He had also submitted a claim in the name of his wife Surjit who was also arrested. Henderson was arrested at Imphal and brought to Lahore for interrogation.

According to the prosecution, Satwant Singh had committed the offence of cheating punishable under s. 420, Indian Penal Code and Henderson had abetted him in the commission of that offence by falsely certifying Satwant Singh's claims to be true, knowing that they were false and thereby had committed an offence punishable under s. 420/109, Indian Penal Code.

Satwant Singh having expressed a desire to make a confession, his confession was recorded by a First Class Magistrate on the 9th of May, 1944.

There being many cases of acceptance of bribe and criminal breach of trust by public servants and cheating of Government by certain persons and cases similar to that of Satwant Singh, Ordinance No. XXIX of 1943, hereinafter referred to as the Ordinance, for trial of such cases was promulgated by the Governor-General of India in 1943. Subsequently, this Ordinance was amended by Ordinance XII of 1945. By virtue of a notification issued under the Ordinance as amended the case of Satwant Singh was allotted to the Third Special Tribunal at Lahore for trial with Henderson as his

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co-accused. After the partition, the trial by the Special Tribunal took place at Simla.

Henderson had absconded to England and extradition proceedings had to be taken against him under the Fugitive Offender's Act of 1881 He was brought before the Special Tribunal in December, 1949. In the meantime, Satwant Singh's case was separated and the trial against him alone continued. On Henderson's return, the trial once again became a joint trial. Henderson applied for examination of certain witnesses on commission in England. His prayer was granted. Satwant Singh fearing that the trial of the cases against him would be delayed, requested that his cases be separated from the cases against Henderson. This prayer was allowed and his trials proceeded against him as the sole accused except in the trial of Cases Nos. 54, 55 and 56 in which Henderson was a co-accused with him.

The Special Tribunal imposed sentences of imprisonment ranging from one year to three and a half years in the several trials. In addition, it imposed fines of various amounts. It divided the fines into "ordinary" and "compulsory", the latter by virtue of s. 10 of the Ordinance. In default of payment of the "ordinary" fines it directed the appellant to undergo further imprisonment for certain periods. There was no such direction with respect to the "compulsory" fines. The High Court reduced the sentence of imprisonment to two years in all the trials where such sentence was in excess of that period. The sentences of imprisonment in all the trials were to run concurrently. The High Court maintained the sentence of "ordinary" fines imposed by the Special Tribunal but set aside the sentence of "compulsory" fines.

The State had filed a petition before the High Court for the enhancement of the sentences of

fine passed against Satwant Singh which was dismissed on the ground that the "compulsory" fines imposed were invalid in view of the decisions of this Court in the case of *Rao Shiv Bahadur Singh and Another* v. *The State of Vindhya Pradesh* (1) and in the case of *Kedar Nath Bajoria* v. *The State of West Bengal* (2). In the opinion of the High Court, enhancement of sentences of fine would be a method by which the provisions of Art. 20 of the Constitution would be circumvented.

Satwant Singh has appealed against his conviction and sentence as ordered by the High Court. The State of Punjab has also appealed against the decision of the High Court that the "compulsory" fines imposed were illegal. The State also has made a prayer that the "ordinary" fines imposed upon Satwant Singh may be enhanced.

On behalf of the appellant his conviction was challenged on several points of law. Firstly, it was urged that the provisions of s. 188 of the Code of Criminal Procedure had not been complied with. The charge framed against the appellant stated that he had committed the offence of cheating at Simla and Kolhapur. Kolhapur was a place outside British India at the relevant time. In the present case there was neither a certificate of the Political Agent nor a sanction of the Provincial Government as required under s. 188 of the Code of Criminal Procedure. The facts established that the offence of cheating was committed at Kolhapur and therefore it could not be enquired into in British India without such a certificate or such sanction. The trial of the appellant therefore was without jurisdiction. Secondly, it was urged that the appellant committed the offence at Kolhapur

(1) [1953] S.C.R. 1189.
(2) [1954] S.C.R. 30

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and Henderson at Jhansi. They could not be tried together in a single trial by the Special Tribunal at Simla as neither s. 179 nor s. 180 of the Code of Criminal Procedure applied to the facts of the case and in view of the provisions of s. 188 of the Code. Thirdly, it was submitted that ss. 233 to 239 of the Code of Criminal Procedure deal with joinder of charges and joinder of persons in a trial. Ss. 234 and 239 of the Code could not be combined to try the appellant and Henderson in a single trial for 3 offences of cheating by the former and 3 offences of abetment thereof by the latter. S. 239 of the Code was a self-contained provision and had to be read without bringing into aid the provisions of s. 234. Fourthly, it was pointed out that as no sanction under s. 197 of the Code by the proper authority had been given for the prosecution of Henderson, he could not be tried without such a sanction. Joint trial of Henderson and the appellant without such a sanction vitiated the trial. Fifthly, it was submitted that as Burma was not a Dominion of His Majesty's Government in 1943 the Ordinance did not apply.

In the course of the argument the fifth submission was abandoned and, we think, rightly.

It would be convenient to deal together with the first and the fourth submissions regarding the non-compliance with the provisions of ss. 188 and 197 of the Code of Criminal Procedure. Before the provisions of s. 188 can apply it must be established that the offence for which the appellant was charged was committed outside British India. The appellant was charged with the offence of cheating. He had filed certain claims before the Government of Burma at Simla. Those claims were certified as true by Henderson at Jhansi. The claims of the appellant were found to be untrue. In fact, he was not entitled to any payment in respect of these

claims. The misrepresentation by Satwant Singh was at Simla and the false certification of the claims as true by Henderson was at Jhansi. Simla and Jhansi were places in British India. As the result of the misrepresentation by the appellant and the false certification by Henderson the Government of Burma was induced thereby to make the payment of a large sum of money to the appellant at Lahore. The payment at Lahore to the appellant was made at his own request by cheques on the Imperial Bank of India at its Lahore Branch. Lahore was also a place at the relevant time in British India. It is true that in the charge framed Kolhapur was mentioned as one of the places where the cheating had taken place. In our opinion, it was an error in the charge, as framed, to have mentioned that any offence of cheating took place at Kolhapur. That error in the charge, however, was a mere irregularity on a misunderstanding of the facts which could not vitiate the trial. It was, however, urged that as the cheques in favour of the appellant were posted at Kolhapur, in law, the payment to the appellant had been made in Kolhapur and delivery of property, namely, the cheques, which must be regarded as valuable security, was made at Kolhapur. The offence of cheating, therefore, was committed at Kolhapur and neither at Simla nor at Lahore. In our opinion, this submission is misconceived. The posting of the cheques at Kolhapur cannot be regarded as delivery of the cheques to the appellant at Kolhapur because the Post Office at that place could not be treated, in the circumstances of the present case, as the agent of the appellant to whom the delivery of the cheques had been made. In fact, they were not delivered to the appellant at Kolhapur but were delivered to him at Lahore. As regards the place of payment it was urged that when the cheques were issued and posted at Kolhapur, the payment

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to the appellant must be regarded as having been made at Kolhapur. Reliance was placed on The *Commissioner of Income Tax, Bombay South, Bombay v. Messrs. Ogale Glass Works Ltd., Ogale Wadi* (1). That case was considered by this Court in the case of *The Commissioner of Income Tax, Bihar and Orissa* v. *Messrs. Patney and Co.* (2), decided on the 5th of May, 1959, and it was held that the rule in the *Ogale Glass Works'* case was inapplicable to the facts of the case. In the latter case it was found by this Court that "Whatever may be the position when there is an express or implied request for the cheque for the amount being sent by post or when it can be inferred from the course of conduct of the parties, the appellant in this case expressly required the amount of the commission to be paid at Secunderabad and the rule of *Ogale Works'* case would be inapplicable." In the present case an inquiry was made from the appellant how he would like the payment to be made and he replied that cheques payable at the Imperial Bank of India, Lahore Branch, should be sent to him. Accordingly, cheques on the Imperial Bank of India, Lahore Branch, were sent to the appellant by post in Lahore and the appellant encashed them there. In these circumstances, the rule in *Ogale Glass Works'* case is inapplicable and it must be held that the payment was made to the appellant at Lahore and not at Kolhapur where the cheques had been posted. Furthermore, what may be relevant for consideration as to the place of payment for the purpose of the Income Tax Act may not necessarily be relevant for the purposes of a criminal case in which the Courts have to ascertain where the offence of cheating was committed. It seems to us, on the facts established in this case, that no part of the offence of cheating was committed by the appellant outside British India. His

(1) [1955] 1 S.C.R. 185
(2) Civil Appeal No. 326 of 1957

false representation to the Government of Burma that money was due to him was at a place in British India which induced that Government to order payment of his claims. In fact, he was paid at Lahore at his own request by means of cheques on the Branch of the Imperial Bank of India at Lahore. The delivery of the property of the Government of Burma, namely, the money, was made at Lahore, a place in British India, and we cannot regard, in the circumstances of the present case, the posting of the cheques at Kolhapur either as delivery of property to the appellant at Kolhapur or payment of his claims at Kolhapur. The entire argument founded on the provisions of s. 188 of the Code therefore fails. As the offence committed by the appellant was not at a place beyond British India, there was no need for the existence of a certificate of a Political Agent or, in the absence of such a person, a sanction of the Provincial Government.

Coming to the question whether the absence of a sanction under s. 197 of the Code vitiated the trial, it has to be established that Henderson was a public servant removable by the Governor-General-in-Council or the Provincial Government. As no objection had been taken before the Special Tribunal by the appellant in this respect it was urged by the Solicitor General that the prosecution had no opportunity of establishing that Henderson, though a public servant, was a person not removable by the Governor-General-in-Council or the Provincial Government. On the other hand, it was urged by Mr. Harnam Singh that in the High Court the objection had been taken but it had been overruled on the ground that there was in fact a sanction in existence. The High Court was under a misapprehension. The sanction which was in existence was under s. 270 of

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the Government of India Act, 1935, which is given by the Governor-General himself, whereas the sanction under s. 197 of the Code is given by the Governor-General-in-Council. The sanction under s. 270 of the Government of India Act, 1935, could not therefore be treated as a sanction under s. 197 of the Code. In the High Court, apparently, no submission was made that Henderson was not a public servant removable by the Governor-General-in-Council or the Provincial Government. If it is being urged now that Henderson was not such a person then the appellant should be given an opportunity to show that he was a public servant so removable. It is unnecessary to deal with these submissions, which relate to a question of fact, in view of our conclusion as mentioned below with respect to the applicability of the provisions of s. 197 of the Code in the present case.

Under s. 197 no Court shall take cognizance of an offence committed by a public servant who is removable from his office by the Governor-General-in-Council or a Provincial Government, save upon a sanction by one or the other as the case may be, when such offence is committed by him while acting or purporting to act in the discharge of his official duty. Henderson was charged with intentionally aiding the appellant in the commission of an offence punishable under s. 420 of the Indian Penal Code by falsely stating as a fact in his reports that the appellant's claims were true and that statement had been made knowing all the while that the claims in question were false and fraudulent and that he had accordingly committed an offence under s. 420/109, Indian Penal Code. It appears to us to be clear that some offences cannot by their very nature be regarded as having been committed by public servants while acting or purporting to act in the discharge of their official duty. For instance, acceptance of a bribe, an

offence punishable under s. 161 of the Indian Penal Code, is one of them and the offence of cheating or abetment thereof is another. We have no hesitation in saying that where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences [vide *Amrik Singh's case* (1).] The act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty [vide *Matajog Dobey's case* (2)]. It was urged, however, that in the present case the act of Henderson in certifying the appellant's claims as true was an official act because it was his duty either to certify or not to certify a claim as true and that if he falsely certified the claim as true he was acting or purporting to act in the discharge of his official duty. It is, however, to be remembered that Henderson was not prosecuted for any offence concerning his act of certification. He was prosecuted for abetting the appellant to cheat. We are firmly of the opinion that Henderson's offence was not one committed by him while acting or purporting to act in the discharge of his official duty. Such being the position the provisions of s. 197 of the Code are inapplicable even if Henderson be regarded as a public servant who was removable from his office by the Governor-General-in-Council or a Provincial Government.

(1) [1955] 1 S.C.R. 1302
(2) [1955] 2 S.C.R. 925

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Elaborate arguments were advanced in support of the contention that the provisions of s. 197 of the Code were not inconsistent with the Ordinance and therefore had to be complied with before the Special Tribunal could try Henderson. It was pointed out that under s. 6 of the Ordinance the Special Tribunal was specifically authorized to take cognizance of an offence without the accused being committed to it for trial and sub-s. (2) of that section stated that "Save as provided in sub-s. (1) the Code of Criminal Procedure, 1898 (V of 1898), except the provisions of section 196-A and of Chapter XXXIII, shall so far as they are not inconsistent with this Ordinance, apply to proceedings of a Special Tribunal; and for the purposes of the said provisions the Special Tribunal shall be deemed to be a Court of Session, trying cases without a jury, and a person conducting a prosecution before a Special Tribunal shall be deemed to be a Public Prosecutor." It was urged that by virtue of this subsection the provisions of the Code of Criminal Procedure would be applicable except the provisions of s. 196-A and Chapter XXXIII which had been expressly excluded. If s. 197 of the Code was intended to be excluded, the Ordinance would have said so. Having regard to the view we take that the provisions of s. 197 of the Code do not apply to the facts of the present case as the offence of abetment of cheating by Henderson cannot be regarded as an offence committed by him while acting or purporting to act in the discharge of his official duty, it is unnecessary to consider the arguments advanced in this connection.

Coming now to the 2nd and 3rd submissions made on behalf of the appellant we have to consider whether the appellant and Henderson could at all be jointly tried, having regard to the fact that they were jointly tried up to a certain stage

in some of the trials and to the conclusion of the trial concerning cases Nos. 54, 55 and 56. We have already held that no part of the offence of cheating was committed by the appellant outside British India and consequently the provisions of s. 188 of the Code did not apply. The provisions of ss. 179 and 180 are wide enough to enable cognizance to be taken either by a Court where anything was done within the local limits of its jurisdiction or a court where the consequences ensued. Illustration (c) to s. 179 clearly states that if A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear, the offence of extortion committed against A may be inquired into or tried either by X or Y. The appellant could have been therefore tried either at Lahore or at Simla for the offence of cheating as the misrepresentation was at Simla and the consequence was at Lahore as the Government of Burma was induced by the misrepresentation to deliver property (money) at Lahore. Under s. 180 when an act is an offence by reason of its relation to any other act which is also an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done. Illustration (a) to this section states that a charge of abetment may be inquired into or tried either by the Court within the local limits of whose juridiction the abetment was committed or by the Court within the local limits of whose jurisdiction the offence abetted was committed. The offence of cheating by the appellant could have been tried either at Lahore or at Simla. Consequently, Henderson could also have been tried for the abetment of that offence either at Lahore or at Simla. The case of these accused was allotted to the Special Tribunal

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at Lahore and would have normally been tried there but for the partition of India. The trial, under the authority of law, was concluded at Simla. There seems, therefore, to have been no illegality committed in trying the appellant and Henderson together at Simla.

The other line of argument in support of the objection that the appellant and Henderson could not be tried together was based on the provisions of ss. 233 and 239 of the Code. It was pointed out that under the provisions of s. 233 of the Code for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in ss. 234, 235, 236 and 239. Unless, therefore, the joinder of trial of the appellent and Henderson was permitted under s. 239 of the Code it could not be tried together. It was urged that in construing s. 239 of the Code it was not permissible to take into consideration the provisions of s. 234. The only provision by which a person accused of an offence and a person accused of abetment of that offence can be tried together in a single trial is under s. 239(b) which permits persons accused of an offence and persons accused of abetment to be charged and tried together. Under the terms of these provisions any number of persons accused of committing a single offence could be tried together with any number of persons who had abetted that offence. But cl. (b) did not permit the trial of persons accused of several offences and persons accused of abetment of those offences in one trial and to try a person accused of three offences along with a person accused of abetment of those offennces would be contrary to the provisions of cl. (b). If the provisions of s. 239(b) and s. 234 were combined the result would be to create another exception to be added to the

exceptions stated in s. 233 of the Code. No Court had any authority to create a new exception to s. 233. S. 239 being an exception to s. 233 its provisions had to be construed strictly. The plain words of s. 239(b) make it quite clear that persons who had committed a single offence and those who abetted it only could be tried together. Since the appellant is said to have committed three offences of cheating and Henderson three offences of abetment thereof, the provisions of s. 239(b) did not apply and their trial together was vitiated. It was further pointed out that if there had been misjoinder of trial in the present case it could not reasonably be said that the appellant had not been prejudiced. If the appellant had been tried apart from Henderson, Henderson's confession and all the evidence against him would have been excluded at the trial of the appellant. As the result of Henderson and the appellant being tried together all the evidence against Henderson and his confession must have necessarily adversely affected the case of the appellant.

On the other hand, the Solicitor General submitted that the provisions of the Code of Criminal Procedure must be construed as they stand and reference to decided cases may be made to assist the court in the matter of construction if necessary. The Code itself nowhere stated that ss. 234 and 239 of the Code were mutually exclusive. The entire scheme of joinder of charges and joinder of persons in a single trial has been set out in the Code. Although s. 233 of the Code is clear enough, it has expressly excepted from the application of its provisions ss. 234, 235, 236 and 239. Sections 234, 235, 236 and 239 are permissive sections. They are not compelling sections. That is to say, although these sections permit joinder of charges and joinder of persons a Court may well consider it desirable in

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the interest of justice and having regard to the circumstances of a particular case that the charges framed should be split up and separate trials should take place in respect of them and the accused be tried separately. It was to avoid multiplicity of trials, harassment to the accused and waste of time that the permissive ss. 234, 235, 236 and 239 enable a court, within their terms, to join charges and persons in a single trial. Section 239 permitted joinder of charges and persons in a single trial in cases covered by cls. (a) to (g). These clauses permitted the joinder of persons as accused in one trial and they contemplated the various circumstances in which such persons could be tried together. Joinder of several persons in one trial necessarily involves the framing of more than one charge. If the joinder of charges was within the terms of the section, then the provisions of s. 233 had no application. Although in cl. (b) of the section the words used are "persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence", a reasonable construction of these words could not lead to the conclusion that the words "an offence" meant a single offence because under s. 13 of the General Clauses Act (Central Act X of 1897) words in the singular shall include the plural and *vice versa*. Under cl. (b), therefore, persons accused of several offences and persons accused of abetment thereof could be tried together in a single trial. The concluding words of s. 239 "and the provisions contained in the former part of this Chapter shall, so far as it may be, apply to all such charges" permitted a court to apply that part of Chapter XIX which preceded s. 239. S 234 was one such provision and a court could resort to its provisions so far as they were applicable.

It was further pointed out by the Solicitor General that although the appellant was asked to

specify the points of law upon which these appeals would be urged, he did not state that, in fact, he had been prejudiced by a joint trial of himself and Henderson. He also pointed out that as the result of the amendment of the Code of Criminal Procedure misjoinder of charges did not vitiate the trial unless the misjoinder had, in fact, occasioned failure of justice.

We now proceed to consider some of the provisions of Chapter XIX of the Code which deal with the form of charges and the joinder of charges as well as joinder of persons. So far as the form of the charge is concerned, the provisions of ss. 221 to 232 of the Code would apply in any event where a single accused was being tried on a single or several charges or where several accused were tried for various offences at one trial within the terms of s. 239 of the Code. So far as joinder of charges is concerned, s. 233 clearly requires that for every distinct offence of which any person was accused there must be a separate charge and every such charge must be tried separately. The framers of the Code, however, realised that it would be impracticable to have for all circumstances such a rigid rule. The section, accordingly, excepted from its provisions cases which were covered by ss. 234, 235, 236 and 239. S. 234 accordingly permitted a single accused to be tried at one trial for more offences than one of the same kind committed within the space of 12 months provided they did not exceed three in number. S. 235 went a step further. It permitted an accused person to be tried for more offences than one committed by him and the framing of a charge with respect to every such offence, provided that the series of acts were so connected together as to form the same transaction. It also permitted that if the acts alleged constitute an offence falling within two or more

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separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. It also provided that if several acts of which one or more than one would by or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more of such acts. S. 236 permitted the framing of alternative charges where a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once.

By s. 239 joinder of persons in a single trial is permitted in the circumstances mentioned in cls. (a) to (g). At the trial of such persons charges would have to be framed. Indeed, the section commences with the following words:—

> "The following persons may be charged and tried together.....".

Leaving cl. (b) out for the moment the other clauses of the section clearly contemplate the framing of more than one charge against accused persons when tried together. Under cl. (a) persons accused of the same offence committed in the course of the same transaction can be tried together. Under cl. (c) persons accused of more than one offence of the same kind within the meaning of s. 234 committed by them jointly within the period of 12 months can also be tried together. Under cl. (d) persons accused of different offences committed in the course of the same transaction can be tried together.

Similar is the position in cases mentioned in cls. (e), (f) and (g). It is clear, therefore, that the general rule that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately has no application to these clauses. Indeed, s. 233 contemplated that and expressly excluded the application of its provisions to s. 239. The entire tenor of the provisions of s. 239 indicates that several persons could be tried together for several offences committed in the circumstances mentioned therein. There is no apparent reason why cl. (b) should be construed in the way suggested by Mr. Harnam Singh, according to whom, in one trial any number of persons could be tried for a single offence along with any number of persons accused of abetment of that offence. The argument was based on the words "an offence" in that clause and the suggestion was that these words meant a single offence. Having regard to the provisions of s. 13 of the General Clauses Act, the singular includes the plural and it would not be straining the language of the clause if the same was construed also to mean that persons accused of several offences and persons accused of abetment thereof could be tried together at one trial. So construed framing of three charges under s. 420, Indian Penal Code against Satwant Singh and three charges of abetment against Henderson in the same trial did not infringe the provisions of cl. (b). Furthermore, the concluding words of the section make it clear that the provisions contained in the former part of Chapter XIX, i.e. previous to s. 239 as far as may be shall apply to all charges framed at the trial. It was suggested that the words "the former part of this Chapter" referred to ss. 221 to 232 as Chapter XIX is in two parts, the first part being the form of charges and the second part joinder of charges. Although such headings do appear in the

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Chapter, it is to be noticed that Chapter XIX does not divide itself into several parts as is to be found in many of the Chapters of the Code, e.g., in Chapter XXIII the parts are headed A to L. It is further to be noticed that words similar to the concluding words of s. 239 do not appear in s. 235 of the Code. The reason for these words appearing in s. 239 of the Code appears to be that this section permits persons to be charged and tried together. The Code obviously contemplated that when charges were being framed against each of the several accused in the cases contemplated in s. 239, not only the provisions concerning the form of charges but also the provisions concerning the joinder of charges, as far as may be, should apply. In these appeals the appellant was charged in one trial for three offences of cheating and Henderson for abetment of the same. If the appellant had been tried alone he could have been tried for 3 charges of cheating committed within 12 months and Henderson, in a separate trial, could have been tried for three offences of abetment of the same offences committed within 12 months. There is no good reason for thinking that when cl. (b) of s. 239 permitted the joinder of the appellant and Henderson in a single trial for the commission of the offence of cheating and abetment thereof, the same was confined to one offence of cheating and one offence of abetment. In our opinion, the trial of the appellant and Henderson together on the charges as framed did not vitiate the trial.

It is unnecessary to deal with the last submission of the Solicitor General that the appellant had taken no ground that he had been prejudiced by his joint trial with Henderson because such a question does not arise, having regard to the view we take that there was no misjoinder of trial.

On behalf of the appellant, certain circumstances were urged in mitigation of the sentence.

It was pointed out that Henderson's sentence was reduced to 2 months' imprisonment and a small fine, the proceedings against the appellant had been going on since 1945, the appellant had already served some three months' imprisonment and that there was also a substantial fine. Accordingly, it was prayed that the sentence of imprisonment may be reduced to the period already undergone while the sentence of "ordinary" fine may be maintained. The measure of punishment must be commensurate with the nature and the seriousness of the crime. The appellant had cheated the Government of Burma to the extent of something like 7 lakhs of rupees. It is impossible to say that the sentence of imprisonment as reduced by the High Court was in any way excessive. The fact that Henderson received a light punishment is not a relevant circumstance. The prayer for a further reduction of the sentence cannot be acceded to.

The appeals filed by Satwant Singh are accordingly dismissed.

Criminal Appeal Nos. 124 *to* 129 *of* 1954.

In these appeals the State of Punjab has appealed against that part of the judgment of the High Court which set aside the order of the Special Tribunal imposing what has been described as "compulsory" fines. The High Court felt that it was bound by the decisions of this Court in the cases of *Rao Shiv Bahadur Singh and Another* v. *The State of Vindhya Pradesh* (1), and *Kedar Nath Bajoria* v. *The State of West Bengal* (2).

It was urged by the Solicitor General that the Special Tribunal was in error in describing the fines imposed by it as "ordinary" and "compulsory".

(1) [1953] S.C.R. 1189
(2) [1954] S.C.R. 30

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Section 10 of the Ordinance contemplated no such distinction. What it did direct was, whether or not a sentence of imprisonment was imposed by the Special Tribunal, that a sentence of fine must be imposed and that fine shall not be less in amount than the amount of money or value of other property found to have been procured by the offender by means of the offence. In other words, the section imposed a minimum fine, in any event, whether a sentence of imprisonment was or was not imposed. In the present case a sentence of imprisonment was, in fact, imposed and the total of fines imposed, whether described as "ordinary" or "compulsory", was not less than the amount of money procured by the appellant by means of his offence. Under s. 420 of the Indian Penal Code an unlimited amount of fine could be imposed. Article 20(1) of the Constitution is in two parts. The first part prohibits a conviction of any person for any offence except for violation of law in force at the time of the commission of the act charged as an offence. The latter part of the Article prohibited the imposing of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence with which the appellant had been charged was cheating punishable under s. 420 of the Indian Penal Code which was certainly a law in force at the time of the commission of the offence. The sentence of imprisonment which was imposed upon the appellant was certainly not greater than that permitted by s. 420. The sentence of fine also was not greater than that which might have been inflicted under the law which had been in force at the time of the commission of the offence, as a fine unlimited in extent could be imposed under the section. It was further pointed out that at least Case No. 58, out of which arose Criminal Appeal No. 112 of

1949 in the High Court, was one to which the provisions of Art. 20 could not apply as the conviction in that case was recorded on the 24th of January, 1949, before the Constitution came into force.

Mr. Harnam Singh, on the other hand, drew our attention to s. 63 of the Indian Penal Code and submitted that a sentence of fine could at no time be excessive and, therefore, the sentence of fine which could be imposed under s. 420 was not entirely unlimited as it could not be excessive. In considering whether a fine would or would not be excessive various considerations had to be kept in mind including the seriousness of the offence and the means of the accused.

Section 63 of the Indian Penal Code expressly states that where no sum is expressed to which a fine may extend the amount of fine to which the offender is liable is unlimited. Section 420 of the Indian Penal Code does not express a sum to which a fine may extend, as some of the sections of the Indian Penal Code do. As the section stands, therefore, the extent of fine which may be imposed by a Court under it is unlimited. Whether a fine imposed in a particular case is excessive would be a question of fact in each case. That consideration, however, is entirely irrelevant in considering whether Art. 20 of the Constitution has been contravened by the provisions of s. 10 of the Ordinance as the extent of fiine which can be imposed under s. 420, by law, is unlimited. It cannot be said that s. 10 of the Ordinance in imposing the minimum fine which a court shall inflict on a convicted person was a penalty greater than that which might have been inflicted on that person under the law in force at the time of the commission of the offence, where under such law the extent of fine which could be imposed is unlimited.

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In the case of *Rao Shiv Bahadur Singh,* referred to above, this Court held that Art. 20 of the Constitution must be taken to prohibit a conviction or subjection to penalty after the Constitution in respect of *ex post facto* law whether the same was a pre-Constitutional law or a post-Constitutional law. The prohibition under the Article was not confined to the passing or the validity of the law but extended to the conviction or the sentence and was based on its character as *ex post facto* law and, therefore, fullest effect must be given to the actual words used in the Article. It had been urged in that case that the Vindhya Pradesh Ordinance (No. XLVIII of 1949) was an *ex post facto* law. This Court, however, held that that Ordinance was not an *ex post facto* law. The contention that the provisions of Art. 20 of the Constitution had been contravened was rejected and it was held that the criminal law relating to offences charged against the accused at the time of their commission was substantially the same as obtained at the time of the conviction and sentence under the Indian Penal Code. In *Rao Shiv Bahadur Singh's case* this Court had not to consider whether an *ex post facto* law imposing a minimum fine for an offence with respect to which an unlimited fine could be imposed by the law in existence at the time of the commission of the offence contravened the provisions of Art. 20. In *Kedar Nath Bajoria's case,* in addition to the sentence imposed under the ordinary law, the first appellant was fined Rs. 50,000, including the sum of Rs. 47,550 received by him as required by s. 9(1) of the West Bengal Criminal Law (Amendment) Act of 1949. Reference to the decision in *Rao Shiv Bahadur Singh's case* was made and this Court held that, in any event, the fine to the extent of Rs. 47,550 would be set aside. This Court, however, did not decide whether the total fine imposed was greater than

what could be imposed under the law as it was at the commission of the offence. It assumed that *Rao Shiv Bahadur Singh's case* supported the contention of the first appellant in that case. It is significant that in directing that the appeal would be heard in due course on merits this Court stated that it would be open to the Court in case the conviction was upheld to impose such appropriate fine as it thought fit in addition to the sentence of imprisonment. In the present case even if it be assumed that s. 10 of the Ordinance was an *ex post facto* law in that in the matter of penalty a minimum sentence of fine was directed to be imposed by a court whereas at the time that the appellant committed the offence, s. 420 contained no such provision, what is prohibited under Art. 20 of the Constitution is the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The total sentence of fine—"ordinary" and "compulsory"—in the present case cannot be said to be greater than that which might have been imposed upon the appellant under the law in force at the time of the commission of the offence, because the fine which could have been imposed upon him under s. 420 was unlimited. A law which provides for a minimum sentence of fine on conviction cannot be read as one which imposes a greater penalty than that which might have been inflicted under the law at the time of the commission of the offence where for such an offence there was no limit as to the extent of fine which might be imposed. Whether a fine was excessive or not would be a question of fact in each particular case but no such question can arise in a case where the law imposes a minimum sentence of fine. Under Art. 20 of the Constitution all that has to be considered is whether the *ex post facto* law imposes a penalty greater than that which might be inflicted

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under the law in force at the time of the commission of the offence. For the reasons already stated it cannot be said that s. 10 of the Ordinance imposed any such penalty and, therefore, was in contravention of the provisions of Art. 20.

These appeals are accordingly allowed and the order of the High Court setting aside the "compulsory" fines imposed by the Special Tribunal is set aside and the orders of the Special Tribunal imposing the "compulsory" fines are restored.

Kapur, J.

KAPUR, J.—I have read the judgment prepared by my learned brother Imam J. I agree to the order proposed and the reasons therefor, except that I would base the inapplicability of s. 197, Criminal Procedure Code, to the facts of the present case on different grounds.

The legislature in India has considered it necessary to provide a large measure of protection for public officials from unnecessary harassment and for that purpose s. 197 was enacted in the Criminal Procedure Code and this was recognised by Lord Simonds in the Privy Council case *Gill* v. *The King* (1). That this is the legislative policy may also be gathered from a subsequent enactment, the Prevention of Corruption Act where such provision was incorporated in regard to offences of bribery, corruption and also misappropriation. But the question still remains as to what cases this protection is made applicable.

The contention raised on behalf of the appellant was that his case was prejudiced because of a joint trial with Henderson who, it is contended, was a Major in the Indian Army and who was charged for abetting the offence of cheating committed by the appellant. The argument raised was that Henderson having been commissioned to and

(1) 75 I.A. 41

in the Indian Army was not removable from his office except with the sanction of the Central Government i.e. the then Governor-Genral-in-Council and as there was no such sanction he could not validly be tried for the offence he was charged with. The case made before us in this Court was that the claims put forward by the appellant were sent to Henderson for verification and Henderson verified them to be correct and that he did this while acting or purporting to act in the discharge of his duty as public servant.

The question then is whether the facts which are alleged to constitute the offence of abetment of cheating under s. 420, read with s. 109, Indian Penal Code, fall within s. 197, Criminal Procedure Code.

In *Gill* v. *The King* (1) (supra) the Privy Council laid down the following test as to when a public servant is said to or purports to act in the discharge of his official duty. Lord Simonds there said at p. 59:—

> "A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty..... The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office".

The same test was repeated in *Meads' case* (2) and in *Phenindra Chandra Neogy* v. *The King* (3). *Gill's case* (1) (supra) and *Neogy's case* (3) (supra) dealt with an offence of bribery under s. 161, but *Meads' case* (2) was a case of a Court-martial against an

(1) 75 I.A. 41
(2) 75 I.A. 185
(3) 76 I.A. 10

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officer who was alleged to have misappropriated money entrusted to him and his defence was that while he was sleeping, the currency notes were burnt by the falling of a candle which was burning in his room. In *Hori Ram Singh's case* (1), which was approved by the Privy Council and this Court in *Amrik Singh's case* (2), Vardachariar, J., had accepted the correctness of that track of decisions which had held that sanction was necessary when the act complained of attached to the official character of the person doing it. The test was thus stated by Venkatarama Aiyar, J., in *Amrik Singh's case* (2), (supra) at p. 1307 :—

> "but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution".

Even in regard to cases of misappropriation, this Court in *Amrik Singh's case* (2), (supra) was of the opinion that if the act complained of is so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction would be necessary, but if there is no connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be necessary. There are two other cases reported in

(1) [1939] F.C.R. 159
(2) [1955] 1 S.C.R. 1302

the same volume, *Ronald Wood Mathams* v. *State of West Bengal* (1), and *Shree Kanthiah Ramayya Munipalli* v. *The State of Bombay* (2), which also relate to sanction under s. 197, Criminal Procedure Code. After reviewing all these various authorities, Venkatarama Aiyar, J., held at p. 1310:—

> "The result then is that whether sanction is necessary to prosecute a public servant on a charge of criminal misappropriation, will depend on whether the acts complained of hinge on his duties as a public servant. If they do, then sanction is requisite. But if they are unconnected with such duties, then no sanction is necessary".

In this view of the law we have to decide whether sanction was necessary or not and it is a matter for investigation as to whether an Army officer situated as Henderson was, was so removable even if there was evidence to show that he was attached to the Indian Army. Secondly, it will have to be decided on evidence that the act complained of against Henderson, that is, verifying the claim of the appellant which is the basis for the allegation of abetment of the offence of cheating is directly concerned with his official duties or it was done in the discharge of his official duties and was so integrally connected with and attached to his office as to be inseparable from them. There is evidence neither in support of one, nor of the other.

In this particular case if it was desired to raise such a question, that should have been done at the earliest moment in the trial Court when the facts could have been established by evidence. This is

(1) [1955] 1 S.C.R. 216
(2) [1955] 1 S.C.R. 1177

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not the stage for asking the facts to be proved by additional evidence. In the grounds of appeal to the High Court the objection was to the form of the sanction. It also appears that no argument was raised in the High Court that the sanction under s. 270 of the Constitution Act could not take the place of a sanction under s. 197, Criminal Procedure Code, because the scope of the two provisions is different. But as I have said above the evidence to support the plea under s. 197 and to establish the requisite nexus between the act done by Henderson and the scope and extent of his duties is lacking and therefore the applicability of s. 197 to the facts of the present case cannot be held to have been proved.

In my opinion the foundation has not been laid for holding that sanction under s. 197 was necessary in the instant case. I therefore agree that the appeals be dismissed.

Imam, J.

IMAM, J.—The petitioner's Criminal Appeals Nos. 100 to 105 of 1954 having been dismissed and the conviction of the petitioner having been upheld, this petition is dismissed.

B.R.T.

SUPREME COURT

Before P. B. Gajendragadkar, K. Subba Rao, and J. C. Shah, JJ.

UNION OF INDIA,—*Appellant*

versus

AMAR SINGH,—*Respondent*

Civil Appeal No. 478 of 1957

1959

Oct. 28th

Railways Act (IX of 1890)—Section 72—Contract Act (IX of 1872)—Sections 148, 151, 152 and 161—Goods entrusted to N. W. Railway at Quetta in Pakistan for carriage

to New Delhi in India—N. W. Railway delivering the wagon containing the goods intact to E. P. Railway at the border station in India—E. P. Railway carrying goods to New Delhi—Goods lost while in the custody of E. P. Railway—E. P. Railway—Whether liable to pay compensation for the goods lost—Indian Limitation Act (IX of 1908)—Article 30—Terminus a quo—Burden of proof as to the date of the loss of the goods—On whom lies.

The facts found in the case were that the Receiving Railway (N.W.R.) received the goods of the respondent and delivered the wagon containing the said goods to the care of the Forwarding Railway (E.P.R.), and the latter took over charge of the wagon, carried it to New Delhi and offered to deliver the goods not lost, to the respondent on payment of the railway freight. There was no treaty between the two countries, Pakistan and India, in the matter of the through-booked traffic.

Held, that in the absence of any contract between the two Governments or the Railways, the legal basis on which the conduct of the respondent and the Railways can be sustained is that the respondent delivered the goods to the Receiving Railway with an authority to create the Forwarding Railway as his immediate bailee from the point, the wagon was put on its rails. Or viewed from a different perspective the aforesaid facts clearly indicate that the respondent appointed the Receiving Railway as his agent to carry his goods on the railway to a place in India with whom Pakistan had no treaty arrangement in the matter of through-booked traffic. In that situation the authority in the agent must necessarily be implied to appoint the Forwarding Railway to act for the consignor during that part of the journey of the goods by the Indian Railway, and, if so, by force of the section 194 of Indian Contract Act, the Forwarding Railway would be an agent of the consignor.

Held, that the liability of the Forwarding Railway is governed by section 72 of the Indian Railways Act. Under that section the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under sections 151, 152 and 161 of the

Indian Contract Act, 1872. Under section 151 of the Indian Contract Act, the bailee is bound to take such care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value of the goods bailed; and under section 152 thereof, in the absence of any special contract, he is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken such amount of care of it as is described in section 151. In other words, the liability under these sections is one for negligence only, in the absence of a special contract. The facts found by the High Court as well as by the Subordinate Judge leave no room to doubt that the Forwarding Railway was guilty of negligence in handling the goods entrusted to its care and is liable to pay compensation for the loss of the goods to the respondent.

Held, that a suit against a carrier for compensation for losing the goods is governed by Article 30 of the Indian Limitation Act. Such a suit should be filed within one year from the date when the loss or injury occurs. The burden is upon the defendant who seeks to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit.

Appeal from the Judgment and Decree dated the 17th August, 1954, of the Punjab High Court, Circuit Bench at Delhi in Regular First Appeal No. 76 of 1952, arising out of the Judgment and Decree, dated the 15th December, 1951, of the Court of Sub-Judge, 1st Class, Delhi in Suit No. 169 of 1949/409 of 1950.

GANAPATHY IYER AND D. GUPTA, for Appellant.

GURBACHAN SINGH, HARBANS SINGH, for Respondent.

JUDGMENT

The following Judgment of the Court was delivered by

Subba Rao, J.

SUBBA RAO, J.—This appeal on a certificate granted by the High Court of Judicature for Punjab at Chandigarh is directed against its judgment

confirming that of the Subordinate Judge, First Class, Delhi, in a suit filed by the respondent against the appellant for the recovery of compensation in respect of non-delivery of goods entrusted by the former to the latter for transit to New Delhi.

On August 15, 1947, India was constituted into two Dominions, India and Pakistan; and soon thereafter civil disturbances broke out in both the Dominions. The respondent and others, who were in government employment at Quetta, found themselves caught in the disturbances and took refuge with their household effects in a government camp. The respondent collected the goods of himself and of sixteen other officers, and on September 4, 1947, booked them at Quetta Railway Station to New Delhi by a passenger train as per parcel way bill No. 317909. Under the said bill the respondent was both the consignor and consignee. The N.W. Railway (hereinafter called the Receiving Railway) ends at the Pakistan frontier and the E.P. Railway (hereinafter called the Forwarding Railway) begins from the point where the other line ends; and the first railway station at the frontier inside the Indian territory is Khem Karan. The wagon containing the goods of the respondent and others, which was duly sealed and labelled indicating its destination as New Delhi, reached Khem Karan from Kasur, Pakistan, before November 1, 1947, and the said wagon was intact and the entries in the "inward summary" tallied with the entries on the labels. Thereafter it travelled on its onward march to Amritsar and reached that place on November 1, 1947. There also the wagon was found to be intact and the label showed that it was bound to New Delhi from Quetta. On November 2, 1947, it reached Ludhiana and remained there between November 2, 1947 and January 14, 1948; and the "vehicle summary" showed that

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the wagon had a label showing that it was going from Lahore to some unknown destination. It is said that the said wagon arrived in the unloading shed at New Delhi on February 13, 1948, and it was unloaded on February 20, 1948, but no immediate information of the said fact was given to the respondent. Indeed, when the respondent made an anxious enquiry by his letter dated February 23, 1948, the Chief Administrative Officer informed him that necessary action would be taken and he would be addressed again on the subject. After further correspondence, on June 7, 1949, the Chief Administrative Officer wrote to the respondent to make arrangements to take delivery of packages lying at New Delhi Station, but when the respondent went there to take delivery of the goods, he was told that the goods were not traceable. On July 24, 1948, the respondent was asked to contact one Mr. Krishan Lal, Assistant Claims Inspector, and take delivery of the goods. Only a few articles, fifteen in number and weighing about 6½ maunds, were offered to him subject to the condition of payment of Rs. 1,067-8-0 on account of freight, and the respondent refused to take delivery of them. After further correspondence, the respondent made a claim against the Forwarding Railway in a sum of Rs. 1,62,123 with interest as compensation for the non-delivery of the goods entrusted to the said Railway, and, as the demand was not complied with, he filed a suit against the Dominion of India in the Court of the Senior Subordinate Judge, Delhi, for recovery of the said amount.

The defendant raised various pleas, both technical and substantive to non-suit the plaintiff. The learned Subordinate Judge raised as many as 15 issues on the pleadings and held that the suit was within time, that the notice issued complied with the provisions of the relevant statutes, that the respondent had *locus standi* to file the suit and

that the respondent had made out his claim only to the extent of Rs. 80,000; in the result, the suit was decreed for a sum of Rs. 80,000 with proportionate costs.

The appellant carried the matter on appeal to the High Court of Punjab, which practically accepted all the findings arrived at by the learned Subordinate Judge and dismissed the appeal.

In this Court the appellant questions the correctness of the said decree. Learned Counsel for the appellant raised before us the following points: (1) there was no privity of contract between the respondent and the Forwarding Railway, and if he had any claim it was only against the Receiving Railway; (2) the suit was barred by limitation both under Art. 30 and Art. 31 of the Indian Limitation Act and it was not saved by any acknowledgement or acknowledgements of the claim made within s. 19 of the Limitation Act; and (3) the notice given by the respondent under s. 77 of the Indian Railways Act, 1890, did not comply with the provisions of the said section inasmuch as the claim for compensation made thereunder was not preferred within six months from the date of the delivery of the goods for carriage by the Railway.

The third point may be taken up first and disposed of shortly. Before the learned Subordinate Judge it was conceded by the learned Counsel for the defendant that the notice, Ex. P-32, fully satisfied the requirements of s. 77 of the Indian Railways Act, and on that concession it was held that a valid notice under s. 77 of the said Act had been given by the respondent. In the High Court no attempt was made to question the factum of this concession; nor was it questioned by the appellant

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in its application for special leave. As the question was a mixed one of fact and law, we would not be justified to allow the appellant at this very late stage to reopen the closed matter. We, therefore, reject this contention.

The learned Counsel for the appellant elaborates his first point thus: The Receiving Railway, the argument, proceeds, entered into an agreement with the respondent to carry the goods for consideration to their destination i.e., New Delhi, and in carrying out the terms of the contract it might have employed the agency of the Forwarding Railway, but the consignor was not in any way concerned with it and if loss was caused to him by the default or negligence of the Receiving Railway, he could only look to it for compensation and he had no cause of action against the Forwarding Railway.

This argument is not a new one but one raised before and the Courts offered different solutions based on the peculiar facts of each case. The decided cases were based upon one or other of the following principles: (i) the Receiving Railway is the agent of the Forwarding Railway; (ii) both the Railways constitute a partnership and each acts as the agent of the other; (iii) the Receiving Railway is the agent of the consignor in entrusting the goods to the Forward Railway : an instructive and exhaustive discussion on the said three principles in their application to varying situations is found in *Kulu Ram Maigraj* v. *The Madras Railway Company* (1), *G. I. P. Railway Co.* v. *Radhakisan Khushaldas* (2) and *Bristol and Exeter Railway* v. *Collins* (3); (iv) the Receiving Railway, which is the bailee of the goods, is authorized by the consignor to appoint the Forwarding Railway as a sub-bailee, and, after such appointment, direct

(1) I.L.R. 3 Mad. 240
(2) I.L.R. 5 Bom. 371
(3) VII H.L.C. 194, 212

relationship of bailment is constituted between the consignor and the sub-bailee; and (v) in the case of through booked traffic the consignor of the goods is given an option under s. 80 of the Indian Railways Act to recover compensation either from the Railway Administration to which the goods are delivered or from the Railway Administration in whose jurisdiction the loss, injury, destruction or deterioration occurs. Some of the aforesaid principles cannot obviously be applied to the present case. The statutory liability under s. 80 of the Indian Railways Act cannot be invoked as that section applies only to a case of through-booked traffic involving two or more Railway Administrations in India; whereas in the present case the Receiving Railway is situated in Pakistan and the Forwarding Railway in the Indian territory. India and Pakistan are two independent sovereign powers, and by the doctrine of *lex loci contractus*, s. 80 cannot apply beyond the territories of India; nor can the respondent rely upon the first two principles. There is no allegation, much less proof, that there was any treaty arrangement between these two States governing the rights *inter se* in the matter of through booked traffic.

This process of elimination leads us to the consideration of the applicability of principles (iii) and (iv) to the facts of the present case. The problem presented can only be solved by invoking the correct principle of law to mould the relief on the basis of the facts found.

We shall first consider the scope of the fourth principle and its applicability to the facts of this case. Section 72 of the Indian Railways Act says that the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration

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to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, 1872. Section 148 of the Indian Contract Act defines "bailment" thus:

> "A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them."

G. W. Patson in his book "Bailment in the Common Law" says, at p. 42, thus:

> "If a bailee of a *res* sub-bails it by authority, then according to the intention of the parties, the third person may become the immediate bailee of the owner, or he may become a sub-bailee of the original bailee."

At p. 44 the learned author illustrates the principle by giving as an example a carrier of goods entrusting them to another carrier for part of the journey. One of the illustrations given by Byles J. in *Bristol And Exeter Railway* v. *Collins* (3) is rather instructive and it visualizes a situation which may be approximated to the present one and it is as follows:

> "The carrier receiving the goods may, therefore, for the convenience of the public or his customers, adopt a third species of contract. He may say, "We do not choose to undertake responsibilities for negligence and accidents beyond our limits of carriage, where we have no

(3) VII H.L.C. 194, 212

> means of preventing such negligence or accident; and we will not, therefore, undertake the carriage of your goods from A to B; but we will be carriers as far as our line extends, or our vehicles go, and we will be carriers no farther: but to protect you against the inconveniences and trouble to which you might be exposed if we only undertook to carry to the end of our line of carriage, we will undertake to forward the goods by the next carriers, and on so doing our liability shall cease, and our character of carriers shall be at an end; and for the purpose of so forwarding and of saving the trouble of two payments, we will take the whole fare, or you may pay as one charge at the end; but if we receive it we will receive it only as your agents for the purpose of ultimately paying the next carriers"."

We may add to the illustration the further fact that the Forwarding Railway is in India, a foreign country in relation to the country in which the Receiving Railway is situate.

Relying upon the said passages, an argument is advanced to the effect that the consignor, i.e., the respondent, authorized his bailee, namely, the Receiving Railway, to entrust the goods to the Forwarding Railway during their transit through India to their destination and the facts disclosed in the case sustain the said plea. There is no document executed between the respondent and the Receiving Railway whereunder the Receiving Railway was expressly authorized to create the Forwarding Railway the immediate bailee of the owner of the goods. Ex. P-50, the railway receipt

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dated September 4, 1947, does not expressly confer any such power. But the facts found in the case irresistibly lead to that conclusion. There was no treaty between the two countries in the matter of through booked traffic; at any rate, none has been placed before us. What we find is only that the Receiving Railway received the goods of the respondent and delivered the wagon containing the said goods to the care of the Forwarding Railway, and the latter took over charge of the wagon, carried it to New Delhi and offered to deliver the goods not lost to the respondent on payment of the railway freight. In the absence of any contract between the two Governments or the Railways, the legal basis on which the conduct of the respondent and the Railways can be sustained is that the respondent delivered the goods to the Receiving Railway with an authority to create the Forwarding Railway as his immediate bailee from the point the wagon was put on its rails.

The same result could be achieved by approaching the case from a different perspective. Section 194 of the Indian Contract Act says:

> "Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him."

The principle embodied in this section is clearly stated by Thesiger L. J. in *De Bussche* v. *Alt* (1) at p. 310 thus:

> "But the exigencies of business do from time to time render necessary the carrying

(1) (1878) L.R. 8 Ch. D. 286, 310

> out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute"; and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute."

The aforesaid facts clearly indicate that the respondent appointed the Receiving Railway as his agent to carry his goods on the railway to a place in India with whom Pakistan had no treaty arrangement in the matter of through booked traffic. In that situation the authority in the agent must necessarily be implied to appoint the Forwarding Railway to act for the consignor during that part of the journey of the goods by the Indian Railway; and, if so, by force of the said section, the Forwarding Railway would be an agent of the consignor.

If no such agency can be implied, in our view, a tacit agreement between the Receiving Railway and the Forwarding Railway to carry the respondent's goods to their destination may be implied from the facts found and the conduct of all the parties concerned. If the Receiving Railway was not an agent of the Forwarding Railway, and if there was no arrangement between the two Governments, the position in law would be that the foreign railway administration, having regard to the exigencies of the situation obtaining during those critical days, brought the wagon containing the goods of the respondent and left it with the

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Forwarding Railway, and the latter consciously took over the responsibility of the bailee, carried the wagon to New Delhi and offered to deliver the goods to the respondent. The respondent also accepted that relationship and sought to make the Forwarding Railway responsible for the loss as his bailee. On these facts and also on the basis of the course of conduct of the parties, we have no difficulty in implying a contract of bailment between the respondent and the Forwarding Railway.

We may also state that s. 71 of the Indian Contract Act permits the recognition of a contract of bailment implied by law under circumstances which are of lesser significance than those present in this case. The said section reads:

> "A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee."

If a finder of goods, therefore, accepts the responsibility of the goods, he is placed vis-a-vis the owner of the goods in the same position as a bailee. If it be held that the Railway Administration in Pakistan for reasons of policy or otherwise left the wagon containing the goods within the borders of India and that the Forwarding Railway Administration took them into their custody, it cannot be denied that their responsibility in regard to the said goods would be that of a bailee. It is true, there is an essential distinction between a contract established from the conduct of the parties and a quasi-contract implied by law; the former, though not one expressed in words, is implied from the conduct and particular facts and the latter is only implied by law, by a statutory or fiction recognised by law. The fiction cannot be enlarged by analogy or otherwise. As we have held that the Receiving

Railway was authorised by the respondent to engage the Forwarding Railway as his agent or as his bailee, this section need not be invoked. But we would have had no difficulty to rely upon it if the Forwarding Railway was equated to a finder of goods within the meaning of the section.

If so, the next question that arises is what is the extent of the liability of the appellant in respect of the goods of the respondent entrusted to it for transit to New Delhi. We have held that, in the circumstances of the present case, the application of the provisions of s. 80 of the Indian Railways Act is excluded. If so, the liability of the Forwarding Railway is governed by s. 72 of the said Act. Under that section the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, 1872. Under s. 151 of the Indian Contract Act, the bailee is bound to take such care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value of the goods bailed; and under s. 152 thereof, in the absence of any special contract, he is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken such amount of care of it as described in s. 151. In other words, the liability under these sections is one for negligence only in the absence of a special contract. Generally goods are consigned under a risk note under which the Railway Company is absolved of all liability or its liability is modified. No such risk note is forthcoming in the present case. The question, therefore, reduces itself to an enquiry whether, on the facts, the Forwarding Railway observed the standard of deligence required of an average prudent man. The

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facts found by the High Court as well as by the Subordinate Judge leave no room to doubt that the Forwarding Railway was guilty of negligence in handling the goods entrusted to its care. The wagon reached Khem Karan intact. D.W. 4 deposed that he received from the guard of the train that brought the wagon to the station, the inward summary and that on checking the train with the aid of that summary he found that the wagon was intact according to the summary. He also found the seals and labels of the wagon intact and that the 'inward summary' tallied with the entries on the labels. It may, therefore, be taken that when the Forwarding Railway took over charge of the goods they were intact. The evidence of P. W. 1, Thakar Das, establishes that even at Amritsar the wagon was intact. But, thereafter in its onward march towards New Delhi it does not appear on the evidence that the necessary care was bestowed by the railway authorities in respect of the said wagon. The said wagon remained in the yard of Ludhiana Station between November 2, 1947, and January 14, 1948, and also it appears from the evidence that when it reached that place the label showed that its destination was unknown. What happened during these months is shrouded in mystery. It is said that the said wagon arrived at New Delhi on February 13, 1948, and that the Goods Clerk, Ram Chander, unloaded the goods in the presence of the head watchman, Ramji Lal and head constable, Niranjan Singh, when it was discovered that only 15 packages were in the wagon and the rest were lost. The Goods Clerk, Ram Chander (D.W. 4), the head watchman, Ramji Lal (D.W. 7), the Assistant Trains Clerk, Krishan Lal (D.W. 8), and the head constable, Niranjan Singh (D.W. 16), speak to the said facts, but curiously no contemporaneous relevant record disclosing the said facts was filed in the present case. We cannot

act upon the oral evidence of these interested witnesses in the absence of such record. No information was given to the respondent about the arrival at New Delhi of the said wagon. Only on June 7, 1948, i.e., nearly four months after the alleged arrival of the wagon, the respondent received a letter from the Chief Administrative Officer asking him to effect delivery of the packages lying in New Delhi Station; but to his surprise, when the respondent went to take delivery no goods were to be found there. Only on August 18, 1948, the appellant offered to the respondent a negligent part of the goods in a damaged condition subject to the payment of the railway freight, and the respondent refused to take delivery of the same. From the said facts it is not possible to hold that the railway administration bestowed such care on the goods as is expected of an average prudent man. We, therefore, hold that the Forwarding Railway was guilty of negligence.

Then remains the question of limitation. The relevant Articles are Arts. 30 and 31 of the Indian Limitation Act. They read:

Description of suit.	Period of limitation.	Time from which period begins to run.
30. Against a carrier for compensation for losing or injuring goods.	One year.	When the loss or injury occurs.
31. Against a carrier for compensation for non-delivery of, or delay in delivering goods.	One year.	When the goods ought to be delivered.

Article 30 applies to a suit by a person claiming compensation against the railway for its losing or injuring his goods; and Art. 31 for compensation for non-delivery or delay in delivering the goods.

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The learned Counsel for the appellant argued that Art. 30 would apply to the suit claim, whereas the learned Counsel for the respondent contended that Art. 31 would be more appropriate to the suit claim. We shall assume that Art. 30 governed the suit claim and proceed to consider the question on that basis.

The question now is, when does the period of limitation under Art. 30 start to run against the claimant? The third column against Art. 30 mentions that the said claim should be made within one year from the date when the loss or injury occurs. The burden is upon the defendant who seeks to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit. The proposition is self-evident and no citation is called for.

Has the defendant, therefore, on whom the burden rests to prove that the loss occurred beyond the prescribed period, established that fact in this case? The suit was filed on August 4, 1949. In the plaint the plaintiff has stated that loss to the goods has taken place on the defendant railway, and, therefore, delivery has not been effected. Though in the written statement there was a vague denial of this fact, the evidence already noticed by us established beyond any reasonable doubt that the goods were lost by the Forwarding Railway when they were in its custody. But there is no clear evidence adduced by the defendant to prove when the goods were lost. It is argued that the goods must have been lost by the said Railway at the latest on February 20, 1948, when the goods are alleged to have been unloaded from the wagon at the New Delhi Station; but we have already discussed the relevant evidence on that question and we have held that the defendant did not place

before the Court any contemporaneous record to prove when the goods were taken out of the wagon. Indeed, the learned Subordinate Judge in a considered judgment held that it had not been established by the Forwarding Railway that the goods were lost beyond the period of limitation. The correctness of this finding was not canvassed in the High Court, and for the reasons already mentioned, on the material produced, there was every justification for the finding. If so, it follows that the suit was well within time. In this view it is not necessary to express our opinion on the question whether there was a subsequent acknowledgement of the appellant's liability within the meaning of Art. 19 of the Indian Limitation Act.

In the result, the appeal fails and is dismissed with costs.

B.R.T.

APPELLATE CIVIL

Before D. Falshaw and G. L. Chopra, JJ.

AMAR NATH AND OTHERS,—*Appellants*

versus

BANKEY BEHARI,—*Respondent.*

(R.F.A. Case No. 143/C of 1955).

1959

Oct., 29th

Limitation Act (IX of 1908) Section 15—Application for final decree in a suit on the basis of mortgage—Whether covered by Section 15—Application for passing final decree consigned in default, after the knowledge of injunction—Effect of—Subsequent application—Whether a revival of the first one.

In a suit on the basis of mortgage a preliminary decree was passed. A son of the original mortgagor obtained an injunction restraining the decree-holder from taking any