

ALLAHABAD HIGH COURT

Daud Khan

Vs

Emperor

(K Lal, J.)

07.08.1925

JUDGMENT

Kanhaiya Lal, J.

1. The accused Daud Khan and Sharf Uddin have been convicted of an offence under Section 404 of the Indian Penal Code and sentenced to rigorous imprisonment for four months and a fine of Rs. 100 each. It appears that one Musammat Aziman was indebted to Nanhu Khan and that when she died Nanhu Khan brought a suit against Daud Khan, alleging that he was the successor of the deceased and claiming the money due by her from the assets left by her at the time of her death which were stated to be in his possession. The assets consisted of a house situated in the village Jagatpur. In that suit Daud Khan pleaded that Alauddin was the heir of Musammat Aziman and that he had been unnecessarily impleaded. It was ascertained on enquiry that Alauddin was missing from about eight years and the suit was decreed against the assets of Musammat Aziman in the hands of Daud Khan.

2. Nanhu Khan subsequently sold his decree to Mahoob Khan who found that Daud Khan and his son Sharf Uddin had removed some materials from the house left by Musammat Aziman. On his complaint Daud Khan and Sharf Uddin have been convicted, and the only question for consideration is whether that section of the Indian Penal Code is applicable to the case.

3. Section 404 lays down that a person who dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be liable to punishment under that section. The property removed by the accused in this case consisted of the rafters used in the house left by Musammat Aziman. They were immovable property so long as they were attached to the house, but became movable property when they were severed from the house; and as the two accused had on their own showing no title to the house and the house was not in the possession of any person legally entitled to its possession. Section 404 of the Indian Penal Code applies if after severing the

rafters from the house, they dishonestly removed them and misappropriated or converted them to their own use. The word "property," is not defined anywhere in the Indian Penal Code, but the word "movable property" is defined by Section 22 as intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth. In their severed state the rafters were movable property. The person entitled to the house was Alauddin Khan, and, failing him, any other nearest heir of the deceased or the zamindar, as the case may be. The accused do not claim any title to the house. They removed the rafters in order to obtain a wrongful gain to the prejudice of the decree-holder whose decree was still outstanding. In other words they dishonestly misappropriated property which was in the possession of a deceased person at the time of her death and has not since been in the possession of any person legally entitled to it.

4. Like Section 378, Section 403 refers to moveable property. Section 404 and some of the other sections following it refer to property without any such qualifying description; and in each case the context must determine whether the property there referred to is intended to be property moveable or immovable. In *Ram Manick Saha v. Brindabun*¹, J. observed that where a person was entrusted with the dominion over property and wilfully omitted to pay revenue and caused the same to be sold at a revenue sale for the purpose of defrauding the mortgagee and purchased it himself in the name of some other person, he could be treated as having dishonestly misappropriated the same and converted it to his own use in violation of the legal contract which had been made affecting it. In *Queen-Empress v. Abdul Ahad*² where a certain person who, personating a Court peon, proclaimed by beat of drum that a tenant had been ordered by the Court, of which he personated himself to be the peon, to be ousted from a holding, it was held that Section 420 of the Indian Penal Code could have no application to the delivery of immovable property or to the surrender of the cultivatory holding. In *Jugdawn Sinha v. Queen Empress*³ the word property referred to in Section 405 of the Indian Penal Code was treated as meaning moveable property as in Section 403, and it was laid down that an offence of criminal breach of trust could not be committed in respect of immovable property. In *Reg v. Girdhar*⁴ it was held that Section 404 of the Indian Penal Code did not apply to immovable property left by a deceased person. Section 404 contains no such express limitation; and criminal mis-appropriation or conversion is easily possible of immovable property, whereas in this case the materials have been severed from the building and removed. The appellants have been rightly convicted and there is no sufficient reason for interference in revision. As the materials were not of very great value, and there was no lawful claimant existing, the sentence need not be stringent. The application is dismissed except in so far that substantive sentence of rigorous imprisonment passed on each of the applicants will be reduced to the period they have already undergone. The sentence of fine will be maintained. The bail bonds will be cancelled.

Cases Referred.

3(1896) 23 Cal. 372
46 B.H.C.Cr. 33