

Passing to the merits, it must be noticed, that the representative of the Sirdar Ramchandra Lakshman, who was alive when the suit was filed, and who could be sued in the Agent's Court only, has now been placed on the record. We are of opinion, therefore, that the question of non-joinder of parties need not now be considered. With reference to the property in the Ratnagiri District, it is not contended that the plaintiffs are in possession of the same. There is no equity, therefore, which compels them to include it in their present claim. They exclude it at their own risk, and we offer no opinion as to whether they can, in a subsequent suit, claim actual partition of those lands. The other points urged by appellants' pleader need no remark. The property, the subject-matter of the present appeal, is shown to be liable to actual partition. The fact that some of it was *saranjam*, which has recently been resumed by Government, that is, made *khalsa*, would not render it less so. Cash allowances cannot, of course, be demarcated. The pleader for appellants admitted [212] that he could not satisfy the Court that his clients had not divided the profits of all the properties in the plaint among the co-sharers, including the plaintiffs. We must, therefore, with reference to the above remarks regarding the Court fee, direct that if the plaintiffs do within one month pay the Court fee due on Rs. 5,406-6-10½ in place of the Court fee paid by them on Rs. 130 on their plaint, the decree of the lower Court shall stand confirmed with costs on appellants; in default of such payment the decree of the lower Court will be reversed with all costs on plaintiffs.

Decree confirmed.

18 B. 212.

CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS v. SITA.* [9th March, 1893.]

Indian Penal Code (Act XLV of 1860), s. 403—Criminal misappropriation of moveable property—Property found on an open plain.

The accused, finding a gold *mohur* on an open plain, sold it the next day to a shroff for the full value, and appropriated the sale-proceeds.

Held that, in the absence of any information as to the circumstances under which the coin was lost, and as it was not improbable that the property in the coin had been abandoned by the original owner, the accused could not be convicted of criminal misappropriation under s. 403 of the Indian Penal Code.

[D., 8 Cr. L. J. 249=11 P. R. 1908 (Cr.)=27 P. W. R. 1908 (Cr).]

THIS was a reference by the District Magistrate of Ahmednagar under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

"The accused has been convicted under s. 403, Indian Penal Code, of the dishonest misappropriation of a gold *mohur* coin which according to her statement (and it is not disproved) she had picked up in an open plain in a village near Ahmednagar and which she forthwith sold to a shroff for Rs. 22-12-0.

"The accused has been sentenced by Rao Bahadur M. C. Joshi, First Class Magistrate, to pay a fine of Rs. 30, or, in default, to suffer simple imprisonment for one month."

* Criminal Reference No. 24. of 1893.

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[213] "I believe that the conviction of the accused was not justified."

"The Magistrate has apparently acted on illustration (f) to s. 403, Indian Penal Code, where it is shown that under similar circumstances the finder of a valuable ring may be guilty of an offence under that section. A not uncommon coin, however, like a gold *mohur* is not on a par with a 'valuable ring,' and the finder thereof being in the position of a miserable woman like the accused, who is a Mang by caste, cannot, in my opinion, be held to be guilty of any offence for parting with it for current silver, without advertising her discovery.

"It is to be noted that there is no complaint, and that the Magistrate has taken cognizance of the case on a police report."

The reference was heard by a Division Bench consisting of Candy and Fulton, JJ.

There was no appearance either for the Crown or for the accused.

ORDER.

CANDY, J.—The First Class Magistrate, Ahmednagar, on 12th December, 1892, convicted one Sita, a Mang woman, of having committed criminal misappropriation of property on 15th October, 1892, in respect of a gold *mohur* which she said she had found in an open plain, and sold the next day to a shroff for Rs. 22-12-0. The First Class Magistrate remarked:—

"I can, however, hardly believe her story. It appears more probable that the *mohur* was found by her somewhere in this city, or that it is part and parcel of some stolen property. The accused is a Mang woman, and her possession of the gold *mohur* can no way be presumed as honest."

The Magistrate was not justified in making these remarks. The only evidence was in support of the story that the *mohur* had been found on the open plain, and the only question for consideration was, whether the act of the accused in selling on the next day the coin so found amounted to criminal misappropriation of property. We are of opinion that this question must be answered in the negative. It cannot fairly be said that when accused sold the *mohur* she knew, or had the means of discovering the owner, or that she omitted to use reasonable means to discover [214] and give notice to the owner, and did not keep the property a reasonable time to enable the owner to claim it. It might have been different had the *mohur* been found on a thoroughfare, in which case the finder would naturally believe that the property had been recently lost and that the owner would be discoverable. But in this case the *mohur* may have been lying undiscovered on the plain for weeks. It is a fair inference that the owner had given up all hope of recovering it, and had abandoned his right of ownership. This inference is strengthened by the fact that in December the Magistrate was apparently unable to discover any trace of the owner of the article which had been found in October. No doubt for a conviction under s. 403 it is sufficient if the accused did not in good faith believe that the real owner could not be found (explanation 2, para. 3). But in this case the Mang woman might in good faith have believed that the owner of the *mohur* could not be found. Therefore the conviction and sentence are reversed, and the fine, if paid, should be refunded.

FULTON, J.—The accused has been convicted of dishonestly misappropriating a gold *mohur* which she found lying on the ground and sold immediately without making any attempt to discover the owner. No one has come forward to claim it, and no evidence has been offered to prove that any one lost such a coin about the time or place at which it was found.

The offence consists in the dishonest misappropriation or conversion of moveable property, and before a conviction can be recorded it must be proved that the article forming the object of the charge was moveable property. The law relating to appropriation of things found on the road or in some other open place was explained in the case of the *Queen v. Glyde* (1) by Cockburn, C.J., who told the jury that where property had been cast away or abandoned, any one finding it and taking it acquired a right to it which would be good even as against the former owner, if the latter should be minded to resume it; but that, when a thing had been accidentally lost, the property was not divested, but remained in the owner who lost it. The correctness of this statement will, I [215] believe, hardly be disputed. It has been recognized in India in the case of sacred bulls which had been abandoned by their owners, and were held not to be capable of being the subjects of dishonest misappropriation in the *Queen-Empress v. Bandhu* (2), the *Queen-Empress v. Nihal* (3) and *Romesh Chunder Sannyal v. Hiru Mondal* (4).

The question then arises, whether the evidence proves that at the time when the accused found the gold *mohur*, it remained the property of the person who had lost it; for, if not, it follows that it could not be the subject of dishonest misappropriation, and became on being found the property of the finder. That it had once belonged to some person need not be disputed; but, in the absence of all information as to the circumstances under which it was lost, it seems impossible to say, with any approach to certainty, that it had not been finally abandoned before it was picked up. It may have been dropped on the ground but a few hours previously, or it may have been lost years before, and by mere accident have been moved out of some place where it had been lying concealed, and cast upon the surface of the ground. The original owner may still be in quest of it, or he may long ago have left the locality and abandoned it for ever. That the latter is not an impossible, or even a very improbable, contingency may be inferred from the period which has elapsed without the appearance of any claimant. There was no undue haste about the proceedings. The gold *mohur* was found on the 16th October. The Magistrate considered his decision and disposed of the case on the 12th December. Whether under any circumstances it would be right to convict an accused person of dishonest misappropriation of an article, the real owner of which could not be discovered, need not be discussed; but it seems clear that in the present case the conviction is unsafe, for the circumstances are not sufficiently elucidated to make it reasonably certain that the coin when found was the property of any one, and, unless it could correctly be described as property, neither explanation 2 nor any other part of s. 403 would apply to it. I would, therefore, reverse the conviction and direct that the fine be refunded.

[216] The case, it will be observed, does not fall within the scope of the Treasure Trove Act, inasmuch as the coin when found was not hidden in the soil or in anything affixed thereto (s. 3 of Act VI of 1878).

Conviction and sentence quashed.

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(1) L. R. 1 C. C. 139.

(2) 8 A. 51.

(3) 9 A. 348. (4) 17 C. 852.