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1917, and as payment has been directed to be made in respect of that mortgage, the only obligation on the part of the mortgagee would be if the mortgagor discharges the debt under the first mortgage to reconvey whatever right, title and interest the mortgagee has got under the first mortgage. That reconveyance will not in any way prejudice or affect his rights under the second mortgage. If he is entitled to remain in possession under the second document, the deed of additional charge, then this decree will not prejudice his right. We will, therefore vary the decree of the trial Court by providing that there will be a preliminary mortgage decree under O. XXXIV, r. 4, in favour of the plaintiffs for Rs. 9,025-12-6 with future interest on Rs. 5,318-3-6 at the rate of 6 per cent till the date fixed for redemption and thereafter at 4 per cent. The period of redemption fixed at three months from today. Parties to pay proportionate costs both in the suit and the appeal.

Decree varied.

M. W. P.

APPELLATE CRIMINAL

FULL BENCH

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Rajadhyaksha and Mr. Justice Dixit.

D. K. CHANDRA *v.* THE STATE.*

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August 3

Criminal Procedure Code (Act V of 1898), ss. 233, 234, 235, 236—Joinder of four charges in one trial—Alternative charges of breach of trust and cheating in respect of each of two separate transactions—Whether joinder of charges is permissible.

If the prosecution wishes to justify a trial in which charges are joined, it is for the prosecution strictly to establish that the joinder is permissible under either s. 234, 235 or 236 of the Criminal Procedure Code, 1898. It is a well known canon of construction that exceptions must be strictly construed, and unless the prosecution satisfies the Court that the exception has been strictly complied with, the joinder of charges in a trial must be held to be contrary to law. It may be possible in a conceivable case for the prosecution to establish that a case falls under more than one exception. But if it falls under more than one exception it must so fall that it must not infringe the provisions of any of the three sections. It is not permissible for the prosecution to combine and supplement the three sections in such a manner as to contravene the provisions of any of these three sections.

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* Criminal Appeal No. 433 of 1951.

The accused was charged under s. 409 of the Indian Penal Code with having committed criminal breach of trust in respect of a sum of Rs. 2,500 on April 12, 1949, and in the alternative under s. 420 of the Indian Penal Code with having cheated in respect of the same sum on the same day. He was also similarly charged with having committed criminal breach of trust on April 20, 1949, in respect of a sum of Rs. 900 and in the alternative with having cheated in respect of that sum on the same day. On the question whether the joinder of these four charges in one trial was in accordance with law:—

Held, that the joinder of charges did not fall under any of the three exceptions laid down in s. 233 of the Criminal Procedure Code, viz., those contained in ss. 234, 235 and 236;

that it contravened s. 234 (*1*) because the accused was charged with more than three offences and the offences were not of the same kind; no doubt the accused was charged with having committed only two acts which were of the same nature, but s. 234 (*1*) did not deal with acts, it dealt with offences;

that the joinder could not be justified under s. 235 (*1*) because the four offences with which the accused was charged arose out of two transactions which were separate and distinct;

that the fact that the accused was charged alternatively under s. 236 and not cumulatively was also of no consequence because that section made no distinction between cumulative and alternative charges;

that, therefore, the joinder of charges was illegal and contrary to law.

Emperor v. *Tribhuvandas*,[1] overruled.

Emperor v. *Manant*,[2] *Krisonlal Shamlal* v. *Padmakumar Jagmohanlal*,[3] followed.

Becha Ram v. *Emperor*[4] *Hugh Francis Bellgard* v. *Emperor*,[5] *Emperor* v. *Janeshardas*,[6] *G. S. Ramsheshan* v. *Emperor*[7] and *Kasi Viswanathan* v. *Emperor*,[8] approved.

Rex v. *Daya Shankar*[9] and *Ramkishan Prasad* v. *King Emperor*,[10] dissented from.

In re *B. G. Tilak*,[11] distinguished.

Emperor v. *Keshavlal Panchal*,[12] *Kashiram* v. *Emperor*[13] and *Chetto Kalvar* v. *Emperor*,[14] referred to.

[1] (1908) 10 Bom. L. R. 801.
[2] (1925) 27 Bom. L. R. 1343.
[3] Criminal Appeal No. 708 of 1948, decided by Chagla C. J. and Gajendragadkar J., on August 5, 1949 (Unrep.)
[4] (1944) 1 Cal. 398.
[5] (1941) 2 Cal. 319.
[6] (1929) 51 All. 544.
[7] [1935] A. I. R. Nag. 178.
[8] (1907) 30 Mad. 328.
[9] [1950] A. I. R. All. 167.
[10] (1933) 13 Pat. 170.
[11] (1908) 10 Bom. L. R. 973.
[12] (1944) 46 Bom. L. R. 555.
[13] (1935) 62 Cal. 808.
[14] (1925) 49 Cal. 555.

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Per *Rajadhyaksha J.*—To construe ss. 234, 235 and 236 of the Criminal Procedure Code as supplementing each other would necessarily result in enlarging the scope of each exception. Each section is self contained and the limits of each have been carefully laid down according to the circumstances contemplated in those sections. To combine those sections must necessarily involve the widening of the scope of each and would result in the destruction of the essential elements of those sections.

D. K. Chandra (accused) was a Director of a Clearing and Forwarding Agency carrying on business in the name of Messrs. Alfred E. Mackenzie & Co. Ltd. The complainant, who was the proprietor of a firm called Khushalchand Amarnath & Sons carrying on business as general merchants at Jodhpur, handed over certain shipping documents such as bills of lading, invoices, insurance policies, demand drafts, etc. to the accused at Bombay on April 12, 1949, for clearing and storing the cycle mudguards and cycles which he was importing from the United Kingdom. The complainant at that time also gave the accused Rs. 2,500 by way of deposit for the amount of customs duty and clearing charges.

On April 20, 1949, the complainant delivered to the accused another set of shipping documents for clearing a consignment of cycle handle bars which too he was importing from the United Kingdom, and gave him a sum of Rs. 900 for paying the customs duty and clearing charges in respect of it.

The accused agreed to clear both the above consignments immediately on their arrival, store them in his godown at Bombay and send the bills for clearing charges and customs duty to the complainant at Jodhpur. The goods had arrived at Bombay between 10th and 17th April 1949 but they were not cleared by the accused till September 2, 1949, and therefore, on that day the complainant addressed him a notice through his Advocate.

On September 12, 1949, the complainant received a letter from the Central Office of Messrs. Alfred E. Mackenize & Co. Ltd. at Madras returning all the documents and asking him to make his own arrangements for clearing the goods as they did not have any facility to clear them. On inquiries in the Customs Office, the complainant learnt that the documents had been scrutinized and passed by the Customs Office between 22nd and 23rd April 1949, and that everything was ready but since the customs duty was not paid one consignment was auction sold by the Port Trust authorities for the recovery of

their charges and the other was lying with them in a broken condition.

On November 30, 1949, the complainant lodged a complaint against the accused and three others in the Presidency Magistrate's Third Court, Esplanade, Bombay. No process was issued against one of them and the other two were not to be traced, and therefore the case proceeded against the accused alone. He was charged under s. 409 of the Indian Penal Code for having committed criminal breach of trust in respect of the sum of Rs. 2,500 entrusted to him by the complainant on April 12, 1949, and in the alternative under s. 420 of the Indian Penal Code for having cheated the complainant on that day by making false representations and dishonsetly inducing him to deliver the sum of Rs. 2,500 and the shipping documents. Similar alternative charges were also framed against the accused in respect of the transaction dated April 20, 1949, and all the four offences were tried together.

The learned Magistrate found the accused guilty and convicted him on both the counts under s. 409 and sentenced him to four months' rigorous imprisonment and to pay a fine of Rs. 500 on each of the two counts.

The accused appealed to the High Court.

Ishwarlal C. Dalal, with *Kusum Dalal,* for the accused.

H. M. Choksi, Government Pleader, for the State.

I. C. Dalal. The basic section regarding the joinder of charges is s. 233 of the Criminal Procedure Code. The sections following it provide exceptions to the main rule, viz. that every charge should be tried separately. In the present case there are four separate charges in respect of two different transactions. Ss. 235 and 236 apply to cases of single transaction only and therefore they cannot be relied upon. S. 234 applies where the accused is charged with offences of the same kind. In this case two offences are of one kind and the other two are of a different kind. I submit such joinder of charges is contrary to law, and in support of this proposition I rely on the following cases:—

Becha Ram v. *Emperor* [(1944) 1 Cal. 398]; *Srirangachariar, In re* [(1934) 58 Mad. 178]; *Kasi Viswanathan* v. *Emperor* [(1907) 30 Mad. 328].

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Emperor v. *Keshavlal* [(1944) 46 Bom. L. R. 555] shows by implication that this Court has treated an alternative charge as an additional charge.

In re *B. G. Tilak* [(1908) 10 Bom. L. R. 973] is against me. It has been held therein that the exceptions to s. 233 are not mutually exclusive. That case has been distinguished in *Emperor* v. *Manant* [(1925) 27 Bom. L. R. 1343], which in turn has been followed in *Emperor* v. *Ramchandra Rango* [(1938) 41 Bom. L. R. 98 at p. 117].

In *Emperor* v. *Krishnaji Dange* [(1932) 34 Bom. L. R. 590], Beaumont C. J. has held that even if two distinct offences are proved to have been committed in furtherance of a common purpose that does not make them part of the same transaction.

Hugh Francis v. *Emperor* [(1941) 2 Cal. 319] holds that ss. 234 and 235 do not permit joinder of all charges arising out of three transactions of the same kind carried out within twelve months.

In *Ramkishoon Prasad* v. *King Emperor* [(1933) 13 Pat. 170] and *Emperor* v. *Shib Charan* [(1930) 53 All. 233], it has been held that ss. 234 to 236 are not mutually exclusive.

The Nagpur High Court has not followed the decision in *Tilak's* case. See *G. S. Ramsheshan* v. *Emperor* [(1935) A. I. R. Nag. 178].

My submission is that the exceptions have to be taken singly and not cumulatively. You cannot resort to two or three exceptions at a time and then hold one trial for several charges by resorting to s. 233. Ss. 234 to 236 constitute as they do exceptions to the main rule have to be very strictly construed.

H. M. Choksi. The accused in this case has been charged with two substantive offences which he has committed on two different dates. The prosecution was in doubt whether the acts alleged against him would constitute the substantive offences with which he was charged and therefore by relying on s. 236 two alternative charges were framed in respect of the same acts. I submit there is nothing illegal about such joinder of charges. As ss. 234 to 236 have been held to be cumulative in several cases, resort can be had to two of them simultaneously. The important point to note is that the charges are not cumulative but alternative, and the framing of such alternative charges is permitted by s. 234 read with s. 236. *See* illustration (*a*) to s. 236.

[Dixit J. Why don't you rely on s. 236 only without reference to s. 234?]

Series of acts must be connected with each other. Separate unconnected acts may not come under that section and therefore I have to rely on s. 234 also.

[C. J. How many offences are combined here—two or four?]

I submit that there are only two offences. The other two offences are only in the alternative. The two substantive offences are of the same kind as contemplated by s. 234. The word used in the section is "offence" and not "act". I rely on the argument of the Advocate General which is reported in the *Tilak's* case [(1908) 10 Bom. L. R. 973 at p. 985]. The accused is charged in respect of two acts only. May be that each of those acts has resulted in more than one offence.

I rely on the following cases: *Emperor* v. *Kasamali* [(1942) Bom. 384 at p. 392]; *Chetto Kalwar* v. *Emperor* [(1921) 49 Cal. 555]; *Kashiram Jhunihunwalla* v. *Emperor* (1935) 62 Cal. 808.]

I. C. Dalal, was not called upon in reply.

CHAGLA C. J. In this case the accused is charged with having committed criminal breach of trust in respect of the sum of Rs. 2,500 on April 12, 1949. He is also charged in the alternative with having cheated in respect of the same sum on the same day. He was also charged with having committed criminal breach of trust on April 20, 1949, in respect of a sum of Rs. 900. He is also charged in the alternative with having cheated in respect of the same sum on the same day.

The question that arises for the determination of this full bench is whether the joinder of these four charges is in accordance with law. A large number of authorities were cited at the bar, but before considering them we might look at the scheme of the Criminal Procedure Code itself with regard to the framing of charges. The basic section is s. 233 which contains a mandatory provision and lays down the ordinary rule with regard to joinder of charges, and that section provides 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. It will be noticed that this section makes no distinction between charges which are cumulative, and charges which are in the alternative. The object of this section is to give a fair trial to the accused and not to bring about a situation which might cause the accused prejudice or embarrassment. Therefore whether the accused is to face

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charges in the alternative or charges which are cumulative in their nature, the Legislature assumes that charges tried jointly would cause prejudice and embarrassment and therefore has laid down the ordinary rule with regard to trial in s. 233. But that section itself provides that a departure may be made from the ordinary rule in the cases mentioned in ss. 234, 235, 236 and 239. Therefore, unless the departure from the ordinary rule laid down in s. 233 is justified by one of the sections mentioned in that section itself, the departure will be illegal and contrary to law.

Turning now to the three material sections with which we are concerned, which are ss. 234, 235, and 236. S. 234 provides for trial of more than one offence in the same trial. This section lays down three limitations. The three limitations are that the offences must be of the same kind, that they must have been committed within the space of one year, and that more than three offences should not be joined in the same trial. The three offences may be joined under this section although they may not arise from the same transaction as provided by the next section, s. 235, and even though the offences may not be charged as a result of any doubt experienced as to which of the offence is committed by reason of a single act or a series of acts committed by the accused. Therefore this is the only section which provides for disconnected offences being tried together and as I said before this can only be done provided the three limitations laid down in that section are satisfied. Section 235 (*1*) also provides for trial of more than one offence, but the limitation laid down in that section is that the offences must arise from the same transaction. This section lays down no limitation as to time or number of offences. The only condition is that one series of acts must be so connected together as to form the same transaction and the offences are committed in that series of acts. Sub-section (*2*) deals with offences falling within two or more separate definitions, and sub-s. (*3*) deals with acts constituting one offence but when combined constituting a different offence. Section 236 provides for a case where a single act or a series of acts is of such a nature that it is doubtful which of the several offences the facts which when proved will constitute. It will be noticed that as far as s. 236 is concerned, the offence must arise out of a single act or it must arise out of a connected series of acts. It does not deal with disconnected or separate offences.

It is not very helpful to consider whether the exceptions contained in ss. 234, 235 and 236 are mutually exclusive. It would be better to lay down that if the prosecution wishes to justify a trial in which charges are joined, it is for the prosecution strictly to establish that the joinder is permissible under either ss. 234, 235 or 236. It is a well known canon of construction that exceptions must be strictly construed, and unless the prosecution satisfies the Court that the exception has been strictly complied with, the joinder of charges in a trial must be held to be contrary to law. It may be possible in a conceivable case for the prosecution to establish that a case falls under more than one exception. But if it falls under more than one exception it must so fall that it must not infringe the provisions of any of the three sections. It is not permissible for the prosecution to combine and supplement the three sections in such a manner as to contravene the provisions of any of these three sections.

Now, applying this test to the facts of the present case, we have here a trial of the accused on four charges and he has been charged with having committed four offences. It is not disputed by the Government Pleader that the transaction of April 12, 1949, and the transaction of April 20, 1949, are separate and distinct. Therefore, it cannot be said that these four offences arise out of the same transaction. Therefore, it is clear that the joinder of these charges cannot be justified under s. 235 (*1*) of the Criminal Procedure Code. Is it justified under s. 234 (*1*)? It is not, because the charges contravene s. 234 (*1*) in two respects. In the first place the accused is charged with more than three offences; in the second place the offences are not of the same kind. "Offences of the same kind" is defined in sub-s. (*2*) of s. 234 and the definition is that "offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law." In this case the offences with which the accused is charged are under ss. 409 and 420 of the Indian Penal Code. Therefore the offences do not satisfy the definition of s. 234 (*2*).

A very able and a very ingenious argument was presented to us by the Government Pleader. His contention is that the accused is really charged with two offences of the same kind and therefore the joinder of charges is permissible under s. 234 (*1*). The argument of the Government Pleader is put in

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this way. He says that under s. 236 it is open to the prosecution, if it feels doubts as to facts, to charge the accused alternatively or cumulatively with regard to the commission of any offence, and according to the Government Pleader the accused is charged only with one offence which he committed on April 12, 1949. The prosecution are in doubt as to whether that is an offence of criminal breach of trust or of cheating and therefore they have charged him alternatively under s. 236. Similarly, according to the Government Pleader, the prosecution are in doubt as to the exact nature of the offence committed by the accused on April 20, 1949, and therefore also with regard to that offence he has been charged alternatively under s. 409 and s. 420. Therefore, according to the Government Pleader the accused is charged with having committed only two acts, the accused is charged with having committed only two offences, and both the offences and both the acts are of the same nature, and therefore the joinder of charges is lawful and permissible under s. 234 (*1*). This argument suffers from two fallacies. In the first place, there is a confusion underlying this argument between acts and offences. Section 236 deals with a single act or a series of acts and the charge relates to the offence which arises out of the act or the series of acts. Section 234 (*1*) does not deal with acts, it deals with offences, and the condition laid down in s. 234 (*1*) is that the accused must be charged with not more than three offences of the same kind. Section 234 (*1*) does not provide that the accused may be charged with having committed three acts or three series of acts of the same kind. If that has been the section, then the Government Pleader's argument would be sound and tenable. Therefore, although it may be true, and it is true, that the accused is charged with having committed only two acts, in respect of those two acts he is charged with having committed four offences, and in charging him with committing four offences there is a clear contravention of the provisions of s. 234 (*1*). The second fallacy underlying the Government Pleader's argument is that the Government Pleader looks upon an alternative charge as not being an additional charge at all. The Government Pleader says that it is open to the prosecution to frame an alternative charge under s. 236. He points out that under s. 237 it is even open to the Court to convict a person on an alternative charge if such a charge arises out of s. 236 although the accused is not charged with that alternative charge. The Government Pleader is prepared to concede for the purpose of this argument

that the position might have been different if the accused had been charged cumulatively rather than alternatively in this case. But it will be realised that the Legislature under s. 236 has made no distinction between cumulative and alternative charges. An accused may be charged alternatively or cumulatively if the conditions laid down in s. 236 are satisfied. The Government Pleader further says that although the accused may be charged with having committed four offences, ultimately he can only be convicted on two charges. But what we have to consider is not what the result of the trial would be, not on what charges will the accused be convicted or sentenced, but what are the charges which are framed against him and in respect of how many offences he has to face the trial. It cannot be disputed that the accused will have to face the trial not on two charges but on four charges, not for having committed two offences but four offences, although two of them may be in the alternative. Therefore, in our opinion, applying the test that we have laid down, the joinder of charges against the accused in this case does not fall under any of the three exceptions laid down in s. 233. It contravenes the provisions of s. 234 (*1*) if it is contended that it falls under that section. It also contravenes the provisions of s. 235 (*1*) if it is contended that it falls under that section.

Now in the light of these remarks we might examine the authorities that were cited at the bar. Turning to our own High Court, the earliest case to which our attention has been drawn is a decision in *Emperor* v. *Tribhavandas*.[1] That is a judgment of Mr. Justice Chandavarkar and Mr. Justice Heaton. In that case the accused was convicted by the Chief Presidency Magistrate of having committed offences under s. 124A and s. 153A of the Indian Penal Code in respect of two articles. He was charged under two heads and each head charged the accused with having committed offences under s. 124A and s. 153A of the Indian Penal Code. The accused appealed to this Court and one of the grounds of appeal was that there was a misjoinder of charges. It was contended on behalf of the accused by Mr. Baptista that the offence charged under s. 124A of the Indian Penal Code being distinct from and not an offence of the same kind as the offence charged under s. 153A of the same Code, there was a misjoinder of charges. Mr. Justice Chandavarkar pointed out that the charge for the offence under s. 124A of the Indian Penal Code in respect of one of the two

[1] (1908) 10 Bom. L. R. 801.

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articles in question could be legally joined to the charge for the offence under the same section in respect of the other article, and according to the learned Judge reading ss. 236 and 237 he could have been convicted under s. 153A even though he had been only charged under s. 124A and there had been no charge under s. 153A. On that ground the learned Judge rejected the contention of Mr. Baptista. Now that decision undoubtedly strongly supports the contention advanced by the Government Pleader. But with respect to the learned Judge we might point out that he has overlooked the provisions of s. 234 (*1*) which did not permit the joinder of trial with regard to four offences which are not of the same kind. It is no justification to suggest that s. 124A and s. 153A could have been joined together. They might have been joined together as forming part of the same transaction under s. 235 or they might have been joined together on the basis that there was a question of doubt under s. 236. But whatever the position might have been under s. 235 or s. 236, what the Court had to consider was whether the joinder was justified under s. 234, and in the view that we have taken, with very great respect to that bench, we do not think that that decision was correct. Further Mr. Justice Chandavarkar says at p. 807 that:

> "Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind."

But again with very great respect, the compliance that is required of s. 234 is not a substantial compliance but an actual compliance. It is not enough that the acts must be similar or that the offences must be similar, but in order to bring a case within s. 234 the offences must be of the same kind as defined by s. 234 (*2*) of the Code. And Mr. Justice Heaton at p. 809 observes that

> "The offences in this case were two in number, namely, the publication of the 4th April and the publication of the 11th April."

The learned Judge, with respect, has not drawn the distinction between acts which constitute offences and the offences themselves. The real position was not that the offences were two, but the accused was charged in respect of two acts and those two acts gave rise to four offences and he was tried for four offences.

Then there is a later decision reported in the same volume of the Bombay Law Reporter in In re *B. G. Tilak.*[1] That is a

[1] (1908) 10 Bom. L. R. 973.

judgment of Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor. That decision arose out of an application made by Bal Gangadhar Tilak for leave to appeal to the Privy Council and the leave was not granted on the ground that no case was made out of miscarriage of justice. Tilak was charged in respect of two articles published in the *Kesari* on May 12, 1908, and June 9, 1908, and the learned Chief Justice held that the offences charged constituted a series of acts so connected together as to form the same transaction. Therefore, the finding of the Court was that the joinder of charges with regard to these two articles was justified under s. 235 (*1*) as the two articles constituted one transaction. Having held this the learned Chief Justice went on to consider the other question which, with respect, was really not necessary, and that was whether the exceptions mentioned in s. 233 are mutually exclusive. The learned Chief Justice took the view that these exceptions were not mutually exclusive. With respect, we have no quarrel with this expression if it was intended to be used in the manner we have suggested, but if it was intended to be used in order to convey that although a joinder of charges may contravene one of the sections mentioned in s. 233 it would still be possible to join the charges if it could be shown that the joinder came within the purview of another section mentioned in s. 233, then with respect we are unable to accept that view as a correct view. We do not dispute the correctness of the proposition laid down by the learned Chief Justice that more than one section mentioned in s. 233 can be made use of in co-operation, but the co-operation must not lead to the contravention of any of the sections mentioned in s. 233. The learned Judge further observes (p. 992):

> "We find it difficult to believe that the Legislature intended that a joint trial of three offences under s. 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that ss. 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year."

With respect, we do not agree with this proposition. What the Legislature intended is clear from the language of s. 234 itself, and that is to confine the joinder of charges under that section to three offences of the same kind. Therefore, in our opinion, that particular case did not really decide the point that we have

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to consider and the observations of the learned Chief Justice are obiter.

The next case is *Emperor* v. *Manan*.[1] That is a judgment of Mr. Justice Fawcett and Mr. Justice Coyajee, and the facts there were very similar to the facts here before us. The accused was charged with having committed criminal breach of trust as the manager in respect of three items and he was also charged at the same trial with falsification of accounts with reference to the same three items. The trial was sought to be justified on the ground that although the offence of criminal breach of trust was not of the same kind as the offence of falsification of accounts, there were a series of acts so connected together as to form but one transaction, and that ss. 234 and 235 (*1*) which form exceptions to the general rule, affirmed in s. 233, were not mutually exclusive and that, therefore, s. 235 (*1*) must be read with s. 234. Mr. Justice Coyajee in his judgment at p. 1346 points out that he was unable to accept this contention. He says:—

> ".....It may be conceded that where a person is charged with committing one act of criminal breach of trust and also with falsifying accounts with a view to conceal that particular defalcation, the two may be said to form part of the same transaction."

But in the case before him the learned Judge points out that there were three separate transactions and the law did not permit the joining together of all offences committed in the course of three transactions for the purpose of a joint trial. In the case before us, too, there are two transactions, the transactions of April 12, and 20 and the law does not permit the trying of all offences arising out of two transactions in the same trial. As I have pointed out before, under s. 235 (*1*) all offences arising out of only one transaction may be tried together. In that case also they have referred to *Tilak's* case, and they also took the view that this particular question did not arise for decision in that case. It is true that in that case the charges were cumulative and not in the alternative, but as we have pointed out before, on principle there can be no distinction between charges which are cumulative and charges which are in the alternative. It is true that Mr. Justice Fawcett at p. 1349 does say that—

> "there is obviously a difference between the case of such alternative charges, which do not increase the number of acts underlying the charges, and the present case where the acts are doubled."

With respect, there is again the same underlying confusion between acts and offences and again with very great respect

[1] (1925) 27 Bom. L. R. 1343.

there is a failure to appreciate the fact that s. 234 deals with offences and not with acts. In our opinion, therefore, *Emperor v. Manani* was rightly decided.

Then we come to a judgment of Mr. Justice Divatia and Mr. Justice Lokur in *Emperor* v. *Keshavlal Pancha.*[1] In that case the accused was charged under s. 6, read with ss. 3 and 4 (*a*) and s. 4 (*b*) of the Explosive Substances Act, 1908. After the trial went on and the arguments concluded, the charge under s. 6 was withdrawn and the accused was only convicted of one charge under s. 4 (*b*). The question that arose for consideration before Mr. Justice Divatia and Mr. Justice Lokur was whether the trial was a proper trial inasmuch as the case had gone on all the charges and it was only towards the end that only one charge was left on which the conviction was based, and the Court held that the conviction could not be justified. They held that the trial having proceeded on improper charges framed in contravention of the mandatory provisions of the Code could not be rendered legal by a subsequent amendment of the charge at a late stage. This is really the ratio of the decision. At p. 561 there is an observation in the judgment of Mr. Justice Lokur where he agrees with the view taken by Scott C. J. in *Tilak's* case at p. 992. But really no point arose before that bench which required a consideration of the point that was considered by Scott C. J. in *Tilak's* case, because the bench held at p. 562 that the charges could not be combined under s. 234 (*1*) because they were not offences of the same kind, nor could they be combined under s. 235 (*1*) as they did not constitute one transaction. Therefore, no question really arose as to whether the exceptions were or were not necessarily exclusive and whether ss. 235 and 236 could be resorted to in framing additional charges where the trial was of three offences of the same kind committed within a year.

Then there is an unreported judgment of a division bench consisting of myself and Mr. Justice Gajendragadkar in *Krisonlal Shamlal* v. *Padmakumar Jagmohanlal.*[2] In that case there were two charges each in respect of three transactions, one relating to the forgery of a railway receipt and the second with regard to cheating. The Sessions Judge deleted two charges relating to cheating and the accused was tried on four charges and the charges were cumulative, and the question

[1] (1944) 46 Bom. L. R. 555.

[2] (1949) Crim. Appeal No. 708 of 1948, decided by Chagla C. J., and Gajendragadkar J., on August 5, 1949, (Unrep.).

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that arose was whether the conviction of the accused was proper, and in that case we took the view that it was impossible to contend that the accused in that case was charged only with having committed three offences and not four offences and, therefore, clearly the case did not fall under s. 234 and there had been a contravention of s. 233. There also the Government Pleader had contended that although the accused was charged with having committed four offences, there were in reality only three transactions, and as the three transactions took place in the course of one year the three transactions could be tried together under s. 234 (*1*). We also rejected that argument because it proceeded on the same basis as the present argument of the Government Pleader where instead of arguing on the basis of transactions he has argued on the basis of acts. There he contended that the three transactions, so long as they took place in the course of one year, could be tried in the same trial as falling under s. 234 (*1*). In this case he has contended that if not more than three acts are charged then they could be tried in the same trial under s. 234 (*1*) although those acts may give rise to more than three offences and although the accused may be charged with more than three offences under different sections of the Indian Penal Code. The Government Pleader has tried to distinguish this case by pointing out that here too the charges were cumulative and not alternative. As already pointed out, that is a distinction which we cannot accept as a distinction based on any principle.

Now turning to the decisions of the other High Courts, we may straightaway say that there is a considerable difference of opinion among the different High Courts on the point that we are considering, and with respect the decisions do not always seem to be consistent. We might briefly glance through the important decisions to which our attention was drawn at the bar. Turning first to the High Court of Calcutta, there is a judgment reported in *Becha Ram Mukherji* v. *Emperor.*[1] In that case the appellant was charged with three offences of theft and three offences of dishonest misappropriation in the alternative and, all these six offences were tried at one and the same trial. It will be noticed that there the charges were in the alternative and notwithstanding that fact the Court came to the conclusion that the joinder of charges did not appear to be sanctioned by s. 234 or s. 236 of the Criminal Procedure Code. The Court also held that s. 235 had also no application. Our attention is also drawn to an earlier decision of the

[1] [1944] 1 Cal. 398.

Calcutta High Court reported in *Hugh Fransis Bellgard* v. *Emperor*.[1] There Mr. Justice Lodge and Mr. Justice Akram held that the provisions of ss. 234 and 235 of the Code cannot be utilised to permit the joinder of all charges arising out of three transactions of the same kind carried out within a year. Therefore, if there is more than one transaction, it is not open to combine ss. 234 and 235 and to charge an accused with more than three offences which are disconnected. The Government Pleader has relied on *Kashiram Jhunjhunwalla* v. *Emperor*.[2] In that case a charge of criminal breach of trust with regard to a gross sum consisting of seven items was held to be properly joined at the same trial with two charges of falsification of accounts committed within one and the same year. That case really turned on a construction of s. 222 and what the Court held was that the breach of trust and falsification of accounts arose out of a series of acts constituting one transaction. Therefore, that decision is of no assistance in construing s. 234 (*1*) or the effect of the combination of ss. 234 (*1*), and 235 (*1*). The Government Pleader also relied on *Chetto Kalwar* v. *Emperor*,[3] and he relied on the observation at p. 559. There were cumulative charges against the accused under ss. 411 and 414 and the Court held that these charges were bad for misjoinder under s. 234. Our attention is drawn to the observation in the judgment at p. 559 where it is pointed out:—

> "Had the charges been framed in the alternative, this might have been within the terms of sec. 236, Cr. P. C. But as the charges were framed, they were not in the alternative, and the mistake cannot be corrected by the argument that, if they had been in the alternative, there would have been no defect in the trial."

This observation, with respect, did not directly arise because the charges were cumulative and the learned Judges really did not deliver a considered judgment on the effect of framing alternative charges. As already pointed out, there is a subsequent decision in *Becha Ram Mukherji* v. *Emperor*, where charges were in the alternative and the same view was taken as to the effect of alternative charges.

Turning now to the Allahabad High Court, we have first a judgment of a single Judge, Mr. Justice Dalal, reported in *Emperor* v. *Janeshar Das*,[4] and that learned Judge has taken the same view of s. 233 and the other relevant sections as we have done. There the accused were charged with three offences

[1] [1941] 2 Cal. 319.
[2] (1935) 62 Cal. 808.
[3] (1921) 49 Cal. 555.
[4] (1929) 51 All. 544.

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and each offence was framed in the alternative, either criminal breach of trust or abetment thereof, and the learned Judge held that the provisions of s. 236 could not be utilised to declare the charge in the alternative of embezzlement and abetment thereof to be one charge; it involved two separate charges—a view with which, with respect, we entirely agree. But the Allahabad High Court in a subsequent judgment came to a contrary conclusion and that was in *Rex* v. *Daya Shankar*.[1] In that case Mr. Justice Agarwala and Mr. Justice Bhargava took the view that there was nothing in s. 233 to indicate that ss. 234, 235, 236 and 239 could not be read together. An examination of the provisions of these sections led to the conclusion that the Legislature intended that they should be read as supplementary to each other. They further point out that the principle underlying s. 234 was that offences of the same kind committed within the space of a short period, viz., of one year, and consisting of a few transactions, viz., three transactions, are not expected to prejudice the trial of the accused and so may be tried together, but more transactions than three extending over a larger period may not be so tried together. With the utmost respect, it is difficult to understand how the learned Judges could have come to the conclusion that s. 234 dealt with three transactions. It is only s. 235 that deals with transactions and the limitation in that section is that offences arising out of only one transaction could form the subject-matter of different charges and be combined together. Section 234 speaks of offences and not of transactions.

Turning to the High Court of Patna, there is a decision in *Ramkishoon Prasad* v. *King-Emperor*.[2] In that case a person was charged under s. 409 of the Indian Penal Code with criminal breach of trust in respect of a gross sum consisting of three items, all of which were embezzled in the course of one year, and the Court held that it was competent by virtue of the provisions of ss. 234 and 235 of the Criminal Procedure Code to try with this charge three charges under s. 477A of the Indian Penal Code inasmuch as they formed part of the same transaction. At p. 176 in the judgment it is stated:—

> ".....In our view it is far more consonant with reason and the probable wishes of the legislature that in a proper case the trial of three offences under s. 409 along with falsification of accounts, with which the subject-matter of each charge is linked, should be contemplated than that it should be barred."

[1] [1950] A. I. R. All. 167. [2] (1933) 13 Pat. 170.

Now, he must be a bold man who can say what are the probable wishes of the Legislature. Surely it would be much better to ascertain the wishes of the Legislature from the language used by it in the legislation itself, and we see nothing in s. 233 or s. 234 to justify the conclusion that the Legislature intended that more than three offences should be tried under s. 234 because they arise out of only three transactions or out of only three acts. And it may be pointed out that the Calcutta High Court in *Hugh Francis Bellgard* v. *Emperor* has expressly dissented from the view taken by the Patna High Court in that case.

Turning now to the Nagpur High Court, there is a judgment of that High Court reported in *G. S. Ramsheshan* v. *Emperor*,[1] and there the Court held that the trial of the three charges of embezzlement and all corresponding charges of falsification of accounts together was illegal. With respect, it was rightly pointed out that one particular item embezzled and the falsification of accounts relating to that particular item may be considered to be one transaction for the purpose of s. 235 (*1*), but the three transactions and the six charges arising out of them could not form part of charges which could be joined in the same trial.

And finally the Madras High Court has considered this question in one judgment, and that is in *Kasi Viswanathan* v. *Emperor*,[2] and there the view taken is the same as we are taking, and that is that it is illegal to try a person on a charge which alleges three distinct acts of criminal breach of trust and three distinct acts of falsifying accounts, and the reason why they came to this conclusion was that s. 234 would not apply as the offences of criminal breach of trust and falsification of accounts were not of the same kind, nor would s. 235 have covered the case as the several offences could not be said to form part of the same transaction. That judgment has been referred to with approval in *Emperor* v. *Manani*,[3] at p. 1345, by Mr. Justice Coyajee. In the judgment at p. 329 it is very succinctly pointed out:—

"There is no provision of the Code which says that all offences committed within one year in the course of three separate transactions may be tried at one trial."

Our view, therefore, is, on a review of these authorities, that *Emperor* v. *Tribhuvandas*[4] was wrongly decided, and that *Emperor* v. *Manani*[3] and *Krisonlal Shamlal* v. *Padmakumar*

[1] [1935] A. I. R. Nag. 178. [2] (1907) 30 Mad. 328.
[3] (1925) 27 Bom. L. R. 1343. [4] (1908) 10 Bom. L. R. 801.

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Jagmohanlal[1] were rightly decided. With respect, we agree with the views expressed by the Calcutta High Court in *Becha Ram Mukherji* v. *Emperor* and in *Hugh Francis Bellgard* v. *Emperor*. We agree with the view expressed in *Emperor* v. *Janeshar Das* and also with the view expressed in *G. S. Ramsheshan* v. *Emperor* and in *Kasi Viswanathan* v. *Emperor*. With respect, we are unable to accept the view given expression to by the High Court of Allahabad in *Rex* v. *Daya Shankar* and by the High Court of Patna in *Ramkishoon Prasad* v. *King Emperor*.

RAJADHYAKSHA J. I am in entire agreement with the conclusions arrived at and the reasons therefor given in the judgment which is just delivered by my Lord the Chief Justice. The general rule of procedure is to be found in s. 233 of the Criminal Procedure Code. The provisions contained in ss. 234, 235 and 236 form an exception to the rule and should, therefore, be strictly construed. The wholesome rule expressed in s. 233 of the Criminal Procedure Code was intended to prevent embarrassment and difficulty to the accused in defending himself in respect to the charge brought against him. The Legislature at the same time recognized that under certain circumstances which the Legislature thought would not cause any embarrassment to the accused, the accused could be tried in respect of more than one offence in the same trial and thus multiplicity of trials could be avoided. These circumstances are mentioned in ss. 234, 235 and 236. We are not concerned with the operation of s. 239 in the present appeal. These sections must, therefore, be construed so as to subserve the principles which the Legislature had in mind when it enacted these sections. To construe these sections as supplementing each other would necessarily result in enlarging the scope of each exception. Each section is self-contained and the limits of each have been carefully laid down according to the circumstances contemplated in those sections. To combine those sections must necessarily involve the widening of the scope of each and would result in the destruction of the essential elements of those sections. One can easily imagine the confusion that is likely to follow if we adopted the construction for which the learned Government Pleader has pressed. The prosecution may select three offences of the same kind committed within the space of 12 months against the same person or not, and the accused could be tried on these charges

[1] (1949) Cri. Appeal No. 708 of 1948, decided by Chagla C. J. and Gajendragadkar J., on Aug. 5, 1949 (unrep.).

at one trial under s. 234. Then with respect to each transaction in which those offences are committed, the prosecution can add any number of charges for different offences committed in the course of the same transaction—s. 235 (*1*). If there is any doubt as to which of the several offences the facts which can be proved will constitute, some more cumulative or alternative charges could be added—s. 236. The Legislature could not possibly have intended that the accused should be faced in one trial with such a bewildering multiplicity of charges. But that result must necessarily follow if we were to accede to the contention of the Government Pleader that the operation of these sections could be combined. Probably no Judge would allow such a combination of charges. But that makes no difference to the principle as to whether the combination of these soctions should be permitted so as to destroy the essential principle involved in each section. It is true that in some cases the combination of these sections would cause no prejudice to the accused. I have particularly in mind the situation that would arise by the combination of s. 234 with s. 235 (*2*). If an accused person is charged with the commission of three offences of theft in the course of 12 months and in one case the theft happens to be of a gun for the possession of which the accused holds no license, I cannot see how the accused would be prejudiced by combining the three charges of theft under s. 234 with a charge under the Arms Act under s. 235 (*2*). But merely because in such a case no prejudice would be caused to the accused, it would be no justification on that score to carve out an exception to the general scheme which is contained in those sections of the Code. I realise that this view might lead to multiplicity of prosecutions which could be avoided—in a few cases without prejudice to the accused,—if we accept the contention of the Government Pleader. But the view we are taking guards against far greater difficulty and much hardship to which an accused person may be subjected if we were to hold that the operation of these sections could be combined in framing charges against him in such a way as to extend the scope of each section.

DIXIT J. I agree and have nothing to add.

[*Ed. Note.*—The matter then again came before a Division Bench for hearing upon merits when the trial was held to be illegal and the conviction of the accused was set aside.]

Answer accordingly.

M. W. P.