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RAIMOHAN KARMAKAR v. EMPEROR.

We accordingly accept the recommendation of the Sessions Judge and set aside the order of the Magistrate dated the 24th March 1916.

E. H. M.

CRIMINAL REFERENCE.

Before Mookerjee and Sheepshanks JJ.

1916

June 10.

ARFAN ALI

v.

EMPEROR.*

Theft—Dishonest intent—Bonâ fide claim of right to property, or mere pretence—Proper question for consideration by the Criminal Courts—Criminal trespass—Evidence of complainant's possession, illusory—Penal Code (Act XLV of 1860) ss. 379, 447.

The removal of property in the assertion of a *bonâ fide* claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence.

Whether the claim is *bonâ fide* or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence.

Rex v. *Hall* (1), *Reg.* v. *Wade* (2), *Rex* v. *Jenner* (3), *Reg.* v. *Leppard* (4), *Nassib Chowdhry* v. *Nannoo Chowdhry* (5), *Rumoo Singh* v. *Kali Churn Misser* (6), *Mahomed Jan* v. *Khadi Sheik* (7), *Khetter Nath Dutt* v. *Indro Jalia* (8), *Empress* v. *Budh Singh* (9), *In re Madhab Hari* (10), *Pandita* v. *Rahimulla Akundo* (11), *Emperor* v. *Sabalsang* (12), *Algarasawmi Tevan* v. *Emperor* (13), *Hari Bhuimali* v. *Emperor* (14) followed.

* Criminal Reference No. 86 of 1916, by H. C. Liddel, Sessions Judge of Sylhet, dated May 30, 1916.

(1) (1828) 3 C. & P. 409.
(2) (1869) 11 Cox 549.
(3) (1829) 7 L. J. M. C. (O. S.) 79.
(4) (1864) 4 F. & F. 51.
(5) (1871) 15 W. R. Cr. 47.
(6) (1871) 16 W. R. Cr. 18.
(7) (1871) 16 W. R. Cr. 75.
(8) (1871) 16 W. R. Cr. 78.
(9) (1879) I. L. R. 2 All. 101.
(10) (1887) I. L. R. 15 Calc. 390n.
(11) (1900) I. L. R. 27 Calc. 501.
(12) (1902) 4 Bom. L. R. 936.
(13) (1904) I. L. R. 28 Mad. 304.
(14) (1905) 9 C. W. N. 974.

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Held, upon the facts, that even if the accused had failed to establish his title and possession to the land, it was a case of a *bonâ fide* dispute, and that the conviction of theft was bad.

ON the 17th March one Suraj Ali filed a complaint against the accused, Arfan Ali, stating that the latter with two others had cut and removed eight bamboos from a clump on his *ilam* land covered by pottah No. 12, and had also filled in a pit on another plot of land belonging to him, included in pottah No. 15. The accused was tried by an Honorary Magistrate under ss. 379 and 447 of the Penal Code. He claimed the land of pottah No. 12 and the bamboo clump as his own and in his possession, and that of pottah No. 15 as the property, and in the possession, of his cousin Abdul Sobhan. It appeared that the accused was the *malik* of the land of pottah No. 12, and that his name had been entered as such in certain recent survey proceedings. The evidence of possession by the complainant of the bamboo clump was unconvincing, and the proof of his title shadowy. There was no evidence that he was in possession of the land of pottah No. 15, while his title was illusory. On the other hand there was reliable evidence that it was in the possession of Abdul Sobhan, who paid revenue for it. The name of the complainant did not appear in either pottah.

The Magistrate convicted the accused under the above-named sections and sentenced him to small fines. The Sessions Judge of Sylhet referred the case to the High Court, under s. 438 of the Criminal Procedure Code, recommending the reversal of the convictions and sentences. As to the charge of theft, he held that there was no proof of title or possession in the complainant, but that the title lay with the accused as a co-sharer, and no possession adverse to his had been established; and, finally, that there was a complete want of dishonest intent. He was of opinion, with

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reference to the charge of criminal trespass, that there was no evidence of the complainant's possession of the land, but that it was rather against such claim.

No one appeared in the Reference.

MOOKERJEE AND SHEEPSHANKS JJ. The complainant Suraj Ali and the accused Afran Ali are cousins. On the 17th March 1916 Suraj Ali lodged a complaint against Arfan Ali that the latter, along with two others, had, on the 14th March, cut away eight bamboos from his *ilam* land, and had also filled in a pit made by his sons on another plot of land with a view to catch fish. Arfan Ali was placed on his trial before an Honorary Magistrate and was charged with offences under sections 379 and 447 of the Indian Penal Code, namely, *first*, that he had dishonestly cut and removed eight bamboos from land in pottah No. 12 in the possession of Suraj Ali; and, *secondly*, that he had committed criminal trespass on complainant's land in pottah No. 15 with intent to fill in a pit made by his sons. The defence in substance was that the land of pottah No. 12 belonged to the accused and was in his possession, and that he had lawfully taken his own bamboos. He further denied that he had filled in any pit, and stated that the land in pottah No. 15 was the property of his cousin, Abdul Sobhan, who was in possession thereof. The Honorary Magistrate has convicted the accused and has sentenced him to pay a fine of Rs. 5 and Rs. 3 under sections 379 and 447, respectively, in default to suffer rigorous imprisonment for five days under each section. The Sessions Judge has recommended that the convictions and sentences be set aside, as the elements necessary for a conviction for theft and criminal trespass have not been established. We are of opinion that the view taken by the Sessions Judge is correct.

To sustain a conviction under section 379, it is necessary to prove a dishonest intention to take property out of the possession of another person. Consequently, where property is removed in the assertion of a *bonâ fide* claim of right, the removal does not constitute theft. The claim of right must be an honest one, though it may be unfounded in law or in fact. If the claim is not made in good faith, but is a mere colourable pretence to obtain or to keep possession, it avails not as a defence. In the present case, the accused admits that he did cut the bamboos, but he maintains that the bamboo clump is his property and is in his possession. Now, even the witnesses for the complainant admit that the accused is proprietor of the land in pottah No. 12. The name of the accused is in the pottah, while the name of the complainant is not to be found there. No reason is assigned for the absence of his name, should he really be a co-sharer. He admits that he does not know the area of the land included in pottah No. 12. His witnesses seek to establish that he pays revenue through his cousin, the accused, but he himself does not venture to assert this. Then, again, while some of the witnesses seek to make out an amicable partition between the co-sharers, the complainant does not make any such allegation. The evidence of exclusive possession by the complainant of the bamboo clump, is, as the Sessions Judge rightly observes, extremely unconvincing, while the proof of his alleged title is even more shadowy. Consequently, even if we do not hold that the accused has established his title and possession, there is no room for controversy that this is a case of *bonâ fide* dispute as to title and possession, and the accused cannot be held to have dishonestly cut and removed the bamboos. The principle applicable in circumstances like these is well settled and

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is stated in works of high authority. Sir Matthew Hale in his Pleas of the Crown (Vol. I, pp. 508, 509) observes in his quaint style, "it is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case. If *A*, thinking he hath a title to the horse of *B*, seiseth it as his own, or supposing that *B* holds of him, distrains the horse of *B* without cause, this regularly makes it no felony, but a trespass, because there is a pretence of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it." To the same effect is Sir Edward Hyde East in his Pleas of the Crown (Vol. II, p. 659): "in any case, if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy." Hawkins puts the matter in much the same way in his Pleas of the Crown (Vol. I, Book I, Ch. 19, sec. 12): see also *Rex* v. *Hall* (1), *Reg.* v. *Wade* (2), *Rex* v. *Jenner* (3), *Reg.* v. *Leppard* (4). The same principle has been recognised and applied in a long line of cases in Indian Courts: *Khetter Nath Dutt* v. *Indro Jalia* (5), *Hari Bhuimali* v. *Emperor* (6), *Algarasawmi Tevan* v. *Emperor* (7), which show that a conviction for theft cannot be sustained if there

(1) (1828) 3 C. & P. 409.
(2) (1869) 11 Cox 549.
(3) (1829) 7 L. J. M. C. (O. S.) 79.
(4) (1864) 4 F. & F. 51.
(5) (1871) 16 W. R. Cr. 78.
(6) (1905) 9 C. W. N. 974.
(7) (1904) I. L. R. 28 Mad. 304.

is a *bonâ fide* assertion of a claim of right, but a mere assertion of a claim does not oust the jurisdiction of the Criminal Court; whether the claim is honest must be decided by the Court from all the circumstances of the case, and, as has been said, it should not convict unless it is in a position to say that the claim is a mere pretence: *Nassib Chowdhry* v. *Nannoo Chowdhry* (1), *Runnoo Singh* v. *Kali Churn Misser* (2), *Mahomed Jan* v. *Khadi Sheik* (3), *In re Madhab Hari* (4), *Pandita* v. *Rahimulla Akundo* (5), *Empress* v. *Budh Singh* (6), *Emperor* v. *Sabalsang* (7). In the case before us, we agree with the Sessions Judge that there is a complete absence of any indication of dishonest intention and that, consequently, the conviction under section 379 cannot be supported.'

As regards the conviction under section 447, there is really no evidence that the complainant is in possession of the lands of pottah No. 15, while the evidence as to his title is still more illusory than in the case of pottah No. 12. On the other hand, there is reliable evidence that Abdul Sobhan holds possession of the land of pottah No. 15 and pays revenue for it. In these circumstances, it is impossible to hold that the accused entered into any land in the possession of the complainant with intent to commit an offence or to annoy the person in possession thereof: *Empress* v. *Budh Singh* (6), *In re Shistidhur Parui* (8). The conviction under section 447 cannot accordingly be sustained.

We accept the recommendation of the Sessions

(1) (1871) 15 W. R. Cr. 47.
(2) (1871) 16 W. R. Cr. 18.
(3) (1871) 16 W. R. Cr. 75.
(4) (1887) I. L. R. 15 Calc. 390 N.
(5) (1900) I. L. R. 27 Calc. 501.
(6) (1879) I. L. R. 2 All. 101.
(7) (1902) 4 Bom. L. R. 936.
(8) (1872) 9 B. L. R. App. 19.

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Judge, set aside the convictions and sentences, and direct that the fines, if paid, be refunded.

E. H. M. *Conviction set aside.*

REFERENCE UNDER THE STAMP ACT.

Before Sanderson C. J., Mookerjee and Chaudhuri JJ.

1916
June 14.

LINOTYPE AND MACHINERY, LD. AND THE WINDSOR PRESS OF CALCUTTA, *In re.**

Hire-purchase Agreement—Agreement to hire machinery, whether conveyance or agreement—Stamp duty—Stamp Act (II of 1899), s. 2 (10), Sch. I, Art. 5, cl. (c).

A hire-purchase agreement, not being an agreement to purchase but simply an agreement to hire the machinery in question with an option on the part of the hirer to purchase, comes within the meaning of Art. 5, cl. (*c*) of Sch. I to the Stamp Act, and is, therefore, liable to a stamp duty of eight annas.

Helby v. *Matthews* (1) referred to.

REFERENCE to the High Court under section 57 of the Indian Stamp Act (II of 1899) by the Board of Revenue, Bengal.

On the 28th January 1916, the Collector of Calcutta submitted the hire-purchase agreement, dated 8th June 1914, between Linotype and Machinery, Ld. and the Windsor Press, Calcutta, to the Commissioner of the Presidency Division with a view to obtain a decision of the chief controlling revenue authority as to the correct amount of stamp duty leviable thereon. The document on which no stamp duty had been paid at the time of execution was produced for

* Reference under the Indian Stamp Act (II of 1899).

(1) [1895] A. C. 471.