CRIMINAL REVISION.

Before Rankin C. J. and Patterson J.

ASHUTOSH GHOSH

v.

THE EMPEROR.*

1929

Aug. 9.

Waterways—Fishery—Landlord's rights—Easement—Profits—Tenant's rights, determination of—Summary proceedings—Police court—Natural right—Indian Penal Code (Act XLV of 1860), s. 430.

For a conviction under section 430 of the Indian Penal Code, there must be some infringement of right resting in some one by the act of the accused.

A finding by the appeal court to the effect that "The cutting of an *âbâd bund* entirely without regard to the interests of the tenants, is an infringement of a natural right, which is implicit in the *kabuliyats*," is much too summary to dispose of what may well be a somewhat complicated question of the law of easement or profits.

Before the landlords or their agents can be convicted under section 430, Indian Penal Code, it must be made absolutely clear that the landlords did not have a right to do what they did with reference to the small *khâls* of the *âbâd*. If the tenants have no legal claim to have the water in these *khâls* preserved in such a way that they can use it either for purposes of agriculture or otherwise, then while the conduct of the landlords may be very shabby or very objectionable, it is not an offence under section 430, the essence of which is that they have intentionally inflicted wrongful loss upon the tenants.

RULE obtained by the accused, Ashutosh Ghosh and another.

The facts of the case, out of which this Rule arose, appear fully in the following extract from the judgment passed on appeal by the District Magistrate of Khulna :—

The appellants have been convicted under section 430, Indian Penal Code, and sentenced to fine Rs. 200 each, in default 6 months' rigorous imprisonment.

The complainant's case is as follows: He is a tenant of Maheswaripur *âbâd* since 1315 B. S., when it was largely jungle. It is surrounded by *bunds* to keep out the saline water of tidal rivers and to protect the water of internal *khâls* from becoming saline. The *âbâd* is divided into three *chaks*, the northernmost being No. 3. Complainant and prosecution witness No. 3 have land in *chak* No. 2, prosecution witnesses Nos. 2 and 5 in *chak* No. 3, prosecution witnesses Nos. 4 and 6 in *chak* No. 1. There had been

*Criminal Revision, No. 23 of 1929, against the order of H. Quinton, District Magistrate of Khulna, dated Nov. 8, 1928, confirming the order of B, N. Maitra, Sub-Deputy Magistrate of Khulna, dated Aug. 13, 1928.

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friction between the tenants and *zemindâr*, because, from 1332, the latter has enhanced rents. Under some pressure, fresh *kabuliyats* at enhanced rent have been taken from complainant amongst others, and against prosecution witnesses Nos. 2 and 3 suits for arrears and enhancement were pending at the time of occurrence.

The manager and *nâib* of the estate—the present appellants—the former with a gun and the other with a *lâthi* in their hands ordered and supervised the cutting of *bunds* of Goper *khâl*, Charer *khal* and Patkelchari *khâl*—thus draining them and other *khâls*, which flow into them, into the rivers. They then ordered bailing out of the remaining water in stages—*khaits*. All this was done ostensibly for the purpose of fishing. A new embankment, *bheri*, has been erected by them at the same time to isolate the drainage in *chak* No. 3, where the majority of the refractory tenants have land. The result, which was intended, has been diminution of the supply of drinking water for cattle and human beings and for cleanliness, death of some cattle in the mud, and damage to crops by insufficiency of fresh water to counteract salinity. (In short the tenants of *chak* No. 3 suffered from a scarcity of fresh water.)

The defence is that the *khâls* belong to the *zemindâr*, that he annually settles them with fishermen, that the drainage of small *khâls* such as those in *chak* No. 3 and the use of *khaits* is the normal method of fishing. The appellants also deny their presence at the time of the alleged acts and deny any infringement of the tenants' rights and any diminution of water supply for cattle, human beings, cleanliness or agriculture.

The main point urged before me was that, admitting for the sake of argument, the facts alleged, there has been no infringement of tenants' rights, so that there can be no offence under section 430. * * * For a conviction under section 430, there must be some infringement of right resting in B by the act of A. Before considering whether this condition has been satisfied in this case, it is necessary to decide the following points : (1) Were the *bunds* cut and the *khâls* drained thereby and by the construction of *khaits* ? (2) If so, did those acts cause diminution of the supply of water for drinking for cattle or human beings or for cleanliness or for agriculture ? (3) Were the appellants responsible for those acts ? (4) And if so, did they perform the acts with intent to cause or knowing they were likely to cause wrongful loss or damage to complainant or others, *i.e.*, did they know or intend that the acts would infringe the rights of complainant or others ?" * * *

That the appellants knew this and intended the damage to some tenants, if not to complainant, is, I think, established. Other methods of fishing were open to them, no sluices which might have controlled influx of salt water were built, a new *bheri* was built to isolate the drainage, then appellants persisted in spite of protests and preparations to meet violence—all this indicates that they had an intention to force their own claim of fishery right on tenants, who had proved troublesome regardless of the tenants' rights to use the water of the *khâls* for their cattle and agriculture. It is within my own knowledge, that owing to poor rainfall for 3 or 4 years, prior to the occurrence, several similar *âbâds* have suffered from salinity of soil, little or no crops, consequent arrears of rent and complaints to the district authorities by tenants that they were being harassed to pay arrears, while *zemindâr's agents* were shortsightedly encouraging fishery to the detriment of agriculture and occasionally attempting to drive refractory tenants out altogether by letting salt water into their lands. I am fully aware there are two sides to these complaints, but that this kind of pressure upon defaulting tenants is occasionally employed is within the knowledge of most revenue officers. In this case, I think, it is at least established that the appellants knew they were likely to cause and it is probable that they

intended wrongful loss or damage to complainant and some other tenants. I find that the latter had a right to use the water for their cattle by custom and a natural right implicit in the contract with the *zemindârs* to use the water for agriculture: its mere existence in the *khal* stays salinity in *âbâd* arrears, and if there be salinity the land is useless to the tenant. The appeal is therefore dismissed.

The accused, thereafter, moved the High Court and obtained this Rule.

Mr. Narendrakumar Basu and *Mr. Anilchandra Ray Chaudhuri*, for the petitioner.

None for the Crown.

RANKIN C. J. In this case the two petitioners have been convicted under section 430, Indian Penal Code, for the particular form of mischief, which consists in interfering with the water-supply of a particular *âbâd* called Maheshwaripur *âbâd*. It appears that the petitioner, Ashutosh Ghosh, is the manager and the petitioner, Nripendranath Pradhania, is the *nâib* of the landlord of this *âbâd*. It would appear to be a very large place, which some few years ago was a jungle and which has been made cultivable to some extent by raising *bunds* to protect it from rivers which surround it on three sides. It is divided into three *chaks* and we are concerned with *chak* No. 3, it being the northernmost *chak*. In the *âbâd* there are a large number of small and also some large *khâls* and the opening of the large *khâls* is controlled or closed by sluice gates. The actual condition of the *âbâd* is not very clear, at least to me, upon the evidence and I cannot gather how many of the large *khâls* are within the particular *chak* No. 3, with which we are concerned, but a number of small *khâls* certainly are.

In the ordinary way, during the rains, these *khâls* get filled with rain water, which is not saline or not so saline as the river water. No question seems to arise in this case of the letting in of river water upon these lands, but the complaint is this that, after the rains, and at a time, when there are no crops or agricultural operations going on, the *mâliks* were

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minded to make some revenue out of the fishery right in these different *khâls*. As regards the larger *khâls*, they are fished by nets. As regards the smaller *khâls*, for the first time, as the prosecution alleged, the *mâliks* made up their mind to fish in a special manner, that is to say, by cutting the *bunds* of the small *khâls* so as to let out a considerable amount of water and then placing what is called *khait* or obstruction of some kind at intervals along the small *khâls* and bailing the water out into the next higher part. For purposes of fishing in this manner, the *mâliks* for the first time emptied out all the small *khâls*, with the result that the tenants of *chak* No. 3 suffered from a scarcity of fresh water.

On the findings of the courts below, it would appear that the tenants and the landlords have of late been at daggers drawn, the landlords in some cases having taken *kabuliyats* at a higher rent and the tenants refusing thereafter to pay. It would also appear from the findings, that the method of fishing adopted was adopted for the first time on this occasion and the inferences of the courts below are to the effect that the landlords, being minded to pay back the refractory tenants, adopted this particular method of fishing, with a view to harass them, with the intention that they should not have sufficient water either for their own domestic purposes or for their cattle or for agriculture.

Before we come to have a duty to consider whether the action of the landlords was a piece of intentional oppression or not, it is quite evident that, before the landlords or their agents can be convicted under section 430, Indian Penal Code, it must be made absolutely clear that the landlords did not have a right to do what they did with reference to these small *khâls*. If the tenants have no legal claim to have the water in these *khâls* preserved in such a way that they can use it either for purposes of agriculture or otherwise, then, while the conduct of the landlords may be very shabby or

very objectionable, it is not an offence under section 430, the essence of which is that they have intentionally inflicted wrongful loss upon the tenants. This was a point which was taken, as appears clearly enough from the judgment of the court of appeal. It appears that the matter was put in this way:—"The main point urged before me was that, admitting "for the sake of argument, the facts alleged, there "has been no infringement of tenants' rights so that "there can be no offence under section 430, Indian "Penal Code." Then the learned Judge refers to certain rulings and says that they lay down the principle that, for a conviction under section 430, there must be some infringement of right resting in B by the Act of A. That proposition urged on the part of the defence is incontestable and the appellate court deals with the matter in the end in the following way:—"The issue then comes to this—Did the "appellants know, they were likely to cause or did "they intend to cause wrongful loss or damage, by "draining the *khâls* ostensibly for fishing, to "complainant and other tenants? Did they at least "know they were infringing a right of the tenants, "not to use the water for cattle and agriculture? I "think these questions must be answered in the "affirmative."

"In *âbâd* areas entirely surrounded by *bunds*, "agriculture depends entirely on their efficiency, as "much as it depends upon the soil, sun and rain."

"It is also in evidence from prosecution witnesses, "that the *mâliks* gave assurance to the tenants, they "could use the water. I doubt that any such definite "assurance was given, but, that such an assurance "was implied in the contract between tenants and "*zemindârs*, I have no doubt. The cutting of an "*âbâd bund* entirely, without regard to the interests "of the tenants, is in my opinion an infringement of "a natural right, which is implicit in the *kabuliyats*."

In my judgment, this is much too summary a method to deal with what may well be a somewhat complicated question of the law of easement or profits.

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To my mind, if there is to be a conviction in this case, on the ground that the tenants have a right that at all times of the year this water is to be kept for their use, although the *khâls* admittedly belong to the landlords and although the landlords have admittedly the right to settle them with fishermen in order to make a profit, it is necessary that the question of the nature of the tenants' right should be somewhat more carefully considered than it is easy to do in a police court or, as has been done in the judgment of the learned court of appeal. To begin with, if one is to hold that something is implied in a contract between the parties, it is very necessary not only that the nature of the land should be most carefully explained with reference to the position of the *khâls*—where the larger *khâls* are as well as the smaller ones, but the circumstances, under which the contract was entered into, and, above all, the contract itself, if it is in writing, must be proved and produced. In the present case, though it has been held to be a right implicit in the *kabuliyat*, I do not gather that the *kabuliyat* of the complainant or of anybody else has been so much as put in evidence. How it can be a natural right and at the same time a matter to be implied in the contract, I do not quite understand, but it is evident to me that a very serious question of civil law has been dealt with in these criminal courts in a somewhat cavalier manner and in almost complete absence of the necessary materials, which would enable a lawyer to give an answer to the questions which are raised. In my judgment, a case of this sort can only succeed where the right infringed is reasonably clear and plain. If in a case of this kind, a complicated question of civil law has to be considered, before it can be decided whether the tenants have any actual right to this water or not, then the police court is not only a very unsuitable place for the discussion of such right, but the prosecution would probably fail upon the ground that the landlords might honestly have thought that they had the right which they claimed.

It appears to me that it is not possible to let this conviction stand and the proper course for these tenants, if they desire to assert a right to have the water in these *khâls* kept in such a way as they can use it, is to take proceedings for an injunction in a civil court or to take measures by which the rights of the parties can effectively be ascertained.

In my judgment, the Rule must be made absolute, the conviction and the sentences must be set aside, the accused acquitted and the fines, if paid, must be refunded.

PATTERSON J. I agree.

Rule absolute.

G.S.