CRIMINAL REVISION.

Before Mukherjea J.

HARI BILASH SHAU

v.

NARAYAN DAS AGARWALA*

1937

Sep. 2.

Mischief—"Wrongful loss," Meaning of—Nuisance—Obstruction, when amounts to nuisance—Right of easement, how to be exercised—Indian Penal Code (XLV of 1860), ss. 23, 426.

A private party, having a right of easement, is not entitled to take the law in his own hands in order to remove an obstruction unless it actually amounts to nuisance.

A dominant owner, having a right-of-way over land belonging to another, has no right himself to remove an obstruction unless his right-of-way is impaired by it. If he does so, he has employed unlawful means and if loss of property is caused thereby to another, he is guilty, under s. 426 of the Indian Penal Code.

Emperor v. *Zipru Tanaji Patil* (1) and *Hyde* v. *Graham* (2) referred to.

CRIMINAL REVISION.

The material facts of the case and arguments in the Rule appear sufficiently from the judgment.

Sudhansu Sekhar Mukherji and *Pritibhusan Barman* for the petitioner.

Probodh Chandra Chatterji and *Apurbadhan Mukherji* for the opposite party.

MUKHERJEA J. This is a Rule obtained on behalf of three persons who have been convicted by Mr. C. C. Gupta, Magistrate, First Class, Hooghly, under s. 426 of the Indian Penal Code and sentenced to pay a fine of Rs. 25 each, in default to undergo rigorous imprisonment for one week. Out of the fine, a sum of Rs. 30 was directed to be paid to the complainant as compensation.

*Criminal Revision, No. 692 of 1937, against the order of C. C. Gupta, Magistrate, First Class, at Hooghly.

(1) (1927) I. L. R. 51 Bom. 487. (2) (1862) 1 H. & C. 593; 158 E. R. 1020.

1937

Hari Bilash Shau
v.
Narayan Das Agarwala.

Mukherjea J.

The facts of the case are for the most part undisputed. The complainant has got a house and a privy upon plot No. 630 of *mouzâ* Shibpur which he purchased from one Panchanan Kundu by a registered deed of sale, dated December 21, 1936. On the west side of this land there is an *ejmâli* passage described as the western boundary in the *kabâlâ*, and this passage runs north to south, and is about forty-nine feet long. It has been found by the trial Magistrate that the accused have their land on the west and north of this passage, and that there was a *kâchchâ* drain on the northern part of the passage to the extent of about nine feet which served as an outlet for the excess water of the complainant's house. The drain did not continue further to the south, but as the natural slope was towards that direction, the Magistrate found that the whole passage practically served the purpose of a natural drain. What the complainant has done is this: he has made the entire drain *puccâ* and connected it with the municipal drain on the south. The accused, who are lessees under Panchanan Kundu, the vendor of the complainant, were given a right-of-way over this passage for the purpose of reaching their rented huts, and the allegation of the prosecution is that the accused have pulled down the entire *puccâ* drain constructed by the complainant, and thereby caused wrongful loss to him. The defence was that the accused, having a right-of-way over this *ejmâli* passage, the construction of the *puccâ* drain by the complainant was itself an obstruction of their right-of-way, and they had every right in law to remove it. It was alleged, however, that they had not actually demolished the structure, but had only prevented the construction of the drain before it was built up by the complainant.

On the last point the finding is against the accused, and it has been found by the trying Magistrate that the accused did as a matter of fact demolish the *puccâ* drain.

1937

Hari Bilash Shau
v.
Narayan Das Agarwala.

Mukherjea J.

Mr. Sudhansu Sekhar Mukherji, who appears for the petitioners, has contended before me, that, even on the findings arrived at by the trying Magistrate, no case of mischief under s. 426 has been made out. He argues that the accused admittedly have a right of passing over this *ejmâli* passage, which did not belong to the complainant. If the drain that was constructed by the complainant did obstruct this right of passage, which the accused admittedly had, it was not a wrongful or illegal act on their part to destroy and remove this structure. At the worst it was an act of abating a nuisance which was created by the complainant on this particular place, and as such no conviction under s. 426 of the Indian Penal Code is justifiable.

Now to constitute mischief it is undoubtedly necessary to show that the accused committed an act with intent to cause or knowing that he was likely to cause wrongful loss or damage to any person. "Wrongful loss" as defined in s. 23 of the Indian Penal Code would mean loss by unlawful means of property to which the person losing it is legally entitled.

We need not discuss the question as to whether the site of the drain did really belong to the complainant. Mr. Chatterji, on behalf of the complainant, has argued before me that there is evidence on the record to show that as a matter of fact this site is included in the complainant's *kabâlâ*. I leave this question entirely open and for the purpose of this Revision case I assume that the site of the drain does not really belong to the complainant, but remains still in his vendor. Even if we assume that, there certainly remains the structure and the building materials which constitute the property of the complainant, and if they had been destroyed by the accused by any unlawful means, as is provided for in s. 23 of the Indian Penal Code, it would be certainly a wrongful loss within the meaning of the section. The determination

1937

Hari Bilash Shau v. *Narayan Das Agarwala.*

Mukherjea J.

of this question as to whether the accused employed any unlawful means would depend upon the fact as to whether they had any right to take the law in their own hands for the purpose of removing the structure which according to them constituted an obstruction of their right of easement. It has been held by the Bombay High Court in the case of *Emperor* v. *Zipru Tanaji Patil* (1) that in case of a private easement-right it is not open to the dominant owner to remove the obstruction of his own accord by taking the law in his own hands. The decision undoubtedly proceeds upon the express provisions of s. 36 of the Indian Easement Act, which is in force in Bombay, but not in Bengal. So far as this province is concerned, it may be said, therefore, that the same principle which is recognized by English Courts in the matter of abatement of nuisance relating to obstruction of easement would apply. The tendency of English Judges is undoubtedly to discourage this practice of allowing private parties to redress their grievances by their own acts, *vide Hyde* v. *Graham* (2), and such rights are never allowed unless the obstruction has actually become a nuisance.

In this case it appears from the findings of the trial Magistrate that even before the construction of this *puccâ* drain, water as a matter of fact flowed over this disputed strip. It has been further found that the right-of-way of the accused to go to the rented huts is not in the least impaired by the construction of the *puccâ* drain, and there is no evidence on the record to show that as a matter of fact it is impossible for them to exercise their right-of-way after the drain has been constructed.

In these circumstances, the obstruction, even assuming it to be one, does not amount to a nuisance, and does not justify the accused in removing the structure by taking the law in their own hands.

(1) (1927) I. L. R. 51 Bom. 487. (2) (1862) 1 H. & C. 593; 158 E. R. 1020.

1937

Hari Bilash Shau
v.
Narayan Das Agarwala.

Mukherjea J.

They had really employed unlawful means for the purpose of causing loss to the complainant which in law he is not bound to suffer. As I cannot find on the facts actually found by the trying Magistrate that there was any *bona fides* on the part of the accused in this respect, I am unable to hold that the accused can escape conviction under s. 426 of the Indian Penal Code.

The result is that the Rule is discharged, and the conviction and sentence are upheld.

Rule discharged.

A. C. R. C.

APPELLATE CIVIL.

Before Jack J.

SATYA KINKAR GHANTI

v.

MAKHAN LAL MARWARI.*

1937

Nov. 9, 15.

Limitation—Execution—Resistance to possession of immoveable property—Subsequent suit to establish right to possession, when barred—Code of Civil Procedure (Act V of 1908), O. XXI, r. 103—Indian Limitation Act (IX of 1908), Art. 11A.

When an auction-purchaser's complaint against obstruction by a third party claiming possession by virtue of a right to an undivided share in the land is dismissed under O. XXI, r. 99 of the Code of Civil Procedure, his subsequent suit for a declaration of title and possession of a portion of the said land after partition, and, excluding the share claimed by the defendant, is not governed by Art. 11A of the Limitation Act.

Ganpat Rai v. *Husaini Begam* (1); *Baldeo* v. *Kanhaiyalal* (2) and *Bhimappa* v. *Irappa* (3) distinguished.

Shanmugam Pillai v. *Panchali Ammal* (4) followed.

APPEAL FROM APPELLATE DECREE preferred by the defendants.

The plaintiff who was the decree-holder auction-purchased certain lands including the lands in suit in execution of a mortgage-decree. He took possession of two plots through Court, but his attempt to take possession of the homestead lands was resisted by the widow of a deceased brother of the mortgagor-judgment-debtor claiming to be in possession of a one-third share which belonged to her husband by inheritance. The plaintiff complained against the resistance by an application under O. XXI, r. 97 of the Code of Civil Procedure, but his application, after enquiry, was dismissed on May 10, 1929. The

*Appeal from Appellate Decree, No. 827 of 1937, against the decree of J. P. Banerji, Subordinate Judge of Burdwan at Asansol, dated Mar. 25, 1937, affirming the decree of Pratul Chandra Ray, First Munsif of Asansol, dated Jan. 2, 1937.

(1) [1921] A. I. R. (All.) 92.
(2) (1920) 24 C. W. N. 1001.
(3) (1901) I. L. R. 26 Bom. 146.
(4) (1925) I. L. R. 49 Mad. 596.

1937

Satya Kinkar Ghanti v. Makhan Lal Marwari.

plaintiff subsequently filed this suit on May 21, 1936, for a declaration of his title to a one-third share of the said land and for partition and possession. The defence *inter alia* was that the plaintiff's suit, having been brought more than one year after the dismissal of his application for possession under O. XXI, r. 99, was barred by limitation. The Munsif held that the suit was not barred and decreed the plaintiff's claim for possession after partition, and, the decree, on appeal, was upheld by the Subordinate Judge.

The defendants thereupon appealed to the High Court.

The arguments in the appeal are sufficiently stated in the judgment.

Atul Chandra Gupta and *Purushottam Chatterji* for the appellants.

Jajneshwar Majumdar for the respondents.

Cur. adv. vult.

JACK J. This appeal has arisen out of a suit for partition of the homestead land described in the plaint with the buildings thereon and delivery to the plaintiff of his 1/3rd share thereof.

The only point urged in this appeal is that the suit is barred by limitation under the provisions of Art. 11A of the Limitation Act inasmuch as such a suit should have been brought within one year of an order dismissing under O. XXI, r. 99, an application made by the plaintiff for possession of the whole of this homestead. Rule 103 of O. XXI directs that such an order of dismissal is conclusive subject to the result of a suit to establish the right claimed in his application under O. XXI, r. 97, and, under Art. 11A of the Limitation Act, that suit must be brought within one year. But the plaintiff does not seek to establish the right which he claimed in his application under O. XXI, r. 97, *i.e.*, exclusive possession of the homestead. He now applies for

1937

Satya Kinkar Ghanti v. Makhan Lal Marwari.

Jack J.

partition of the homestead and possession of his one-third share after partition. In these circumstances, Art. 11A of the Limitation Act has no application. In the principal decision referred to on behalf of the appellant, *viz.*, *Ganpat Rai* v. *Husaini Begam* (1), the circumstances were somewhat different and, as the learned Judge in his judgment in that case remarks "each case of this sort will require to "be judged with reference to its own facts". No doubt the Court held in that case that where under O. XXI, r. 99, possession of the whole has been refused, the decree-holder could not subsequently bring a suit for possession of a two-fifth share more than one year after the order under O. XXI, r. 103, but there the opposite party was claiming throughout the whole of the subject matter of the suit (and this point was emphasised by the learned Judge in deciding that suit) whereas in this case the opposite party in the proceedings under O. XXI was claiming only her third share and the plaintiff is not now disputing her right to that share so that he had no reason to bring a suit to reverse the order passed under O. XXI, r. 99. Finally in that case the learned Judge held that there was something fishy in the claim in that suit.

In the other two decisions referred to on behalf of the appellant, *i.e.*, *Baldeo* v. *Kanhaiyalal* (2) and *Bhimappa* v. *Irappa* (3) the circumstances were entirely different. On the other hand the decision in *Shanmugam Pillai* v. *Panchali Ammal* (4), in which the circumstances were exactly similar, supports the view I have expressed and which was taken by the Courts below.

The appeal is dismissed with costs.

Appeal dismissed.

A. A.

(1) [1921] A. I. R. (All.) 92.
(2) (1920) 24 C. W. N. 1001.
(3) (1901) I. L. R. 26 Bom. 146.
(4) (1925) I. L. R. 49 Mad. 596.