ment and makes an order in conformity with it, either party, who has had the benefit of the arrangement and order, is not at liberty to resile from the agreement. The question, whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into; the party who seeks to raise such question being estopped by his own conduct, and the action of the Court taken thereunder.

1879

SHEO GOLAM LALL v. BENI PROSAD.

The judgment of the lower Court must be reversed, and the decree-holder declared entitled to execute his decree in the terms of the agreement of the 15th May 1877.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS v. ROHIMUDDIN (No. 1), NAZIR MAHOMED (No. 2), AND SOMIRUDDIN (No. 3).*

1879 *April* 22.

Murder—Culpable Homicide—Indian Penal Code, s. 300 *(exceps.* 4 *and* 5*).*

Excep. 5 to s. 300 refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.

Per BROUGHTON, J.—*Excep. 5 to s. 300 is not applicable to the case of a premeditated fight, but points to a case of a different character, such as suttee.*

CRIMINAL appeal from the order of the Sessions Judge of Backergunge.

It appeared that a dispute had arisen between Abdool Lashkur and Abdool Khoondkar concerning a piece of land; and that, on the 16th April 1878, Abdool Lashkur came with a

* Criminal Appeal, No. 191 of 1879, against the order of W. Verner, Esq., Officiating Sessions Judge of Backergunge, dated the 3rd February 1879.

1879

EMPRESS v. ROHIMUDDIN.

band of fifty or sixty men, armed with spears and latties, and commenced ploughing the land in dispute; that the men of Khoondkar, being also armed in like manner, endeavoured to prevent them, and a riot ensued, which, however, was put a stop to by the intervention of certain men of position, who induced Abdool Lashkur to withdraw his men. These men afterwards, on being provoked again, returned; and in the melée that followed, Assuruddin, one of Abdool Khoondkar's party, received a wound, from which he died.

Three men belonging to the party of Abdool Lashkur were arrested, *viz.*, Rohimuddin, Nazir Mahomed, and Somiruddin, and charged under ss. 302, 148, and 149 of the Indian Penal Code.

The Sessions Judge considered that the prisoners could not be found under the circumstances guilty of murder, but at most of culpable homicide not amounting to murder. The evidence clearly established that Assuruddin was present at the riot as a professional lattial under the leadership of one Naziruddin; and that the deceased and the men with whom he was siding, being also professional spearmen, brought on the fight intentionally, and that they entered into it willingly and with preconsent, being well aware of the risk they ran by so doing. The Sessions Judge therefore found that the case fell under excep. 5 of s. 300 of the Penal Code, by which it is declared that "culpable homicide is not murder when the person whose death is caused being above the age of eighteen years suffers death, or takes the risk of death, with his own consent;" he therefore, concurring with the assessors, convicted Rohimuddin, Nazir Mahomed, and Somiruddin under ss. 304 and 149 of the Penal Code, and sentenced the two first prisoners to ten years' and the third prisoner to five years' rigorous imprisonment.

The prisoners appealed to the High Court.

No one appeared to argue the case.

The judgments of the Court were as follows:—

AINSLIE, J.—The Judge and assessors have concurred in finding the prisoners guilty of culpable homicide not amounting to murder committed in the course of a riot, and they have

1879

EMPRESS v. ROHIMUDDIN.

been sentenced under s. 304 of the Indian Penal Code read with s. 149. Other persons had been previously tried and convicted on account of the same matter. They were convicted of murder under s. 302 read with s. 149, and the conviction and sentence were affirmed by this Court on the 12th November 1878. In the present trial, the Officiating Judge has held that the case comes under the 5th exception of s. 300 of the Penal Code,—"culpable homicide is not murder when the person whose death is caused being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent." He says, that if "one of a body of professional lattials armed with deadly weapons is killed in a fight which these lattials have voluntarily entered into and provoked,—his death cannot be murder." And in a previous passage he says :—"They were not obliged to fight for the defence of person or property, but they provoked the fight and entered upon it willingly and with preconsent. They were professional lattials armed with spears, and their adversaries were also armed with spears. They were well aware of the risk they ran, and by their conduct showed that they took that risk willingly." The facts are briefly these, that certain persons who may be called Lashkur's party, to which the prisoners belonged, went armed with spears and latties to plough lands claimed by one Abdool Rohim Khoondkar. The latter gathered men, and there was a disturbance, and clods were thrown, but by the mediation of some by-standers a separation was effected. Lashkur's party began to withdraw, whereon Khoondkar's party taunted them, and some violence was used towards one Hurri, who was removing his plough. On this Lashkur's party returned. Some of Khoondkar's men prepared themselves for fighting, and a fight occurred in which Assuruddin, one of Khoondkar's party, was killed by several spear wounds, and another man was wounded. The evidence shows that these men made deliberate preparations to meet the attack of Lashkur's men, and that the case cannot come under exeep. 4 as a sudden fight in the heat of passion upon a sudden quarrel. The assailants in the first instance had gone out armed with deadly weapons, and at the later stage at which the fight occur-

1879

EMPRESS v. ROHIMUDDIN.

red, fighting was deliberately intended by both parties. I cannot concur in the view taken by the Judge that when persons of full age voluntarily engage in a fight with deadly weapons they take the risk of death with their own consent, and that, as a consequence, culpable homicide occurring in such a fight is not murder. If this view is correct, the 4th exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons is not murder, *à fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel would not be murder. It seems to me that the 4th exception clearly indicates that culpable homicide in a fight is murder unless the fight is unpremeditated, and is such as is therein described, sudden in the heat of passion and on a sudden quarrel; a fight is not *per se* a palliating circumstance, only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent. I do not think the 5th exception has any application to such a case. I understand that exception to apply to cases where a man consents to submit to the doing of some particular act either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated. The extract from the report of the Indian Law Commissioners, given in Morgan and Macpherson's edition of the Penal Code at p. 265, contains instances to which the exception applies, and in my opinion cases of this character only are properly to be dealt with under it. The Judge ought to have convicted the prisoners under s. 302 read with s. 149, Penal Code, and sentenced them accordingly. We annul the sentence and conviction passed by the Officiating Sessions Judge of Backergunge, and convict the prisoners Rohimuddin, Nazir Mahomed, and Somiruddin of the murder of Assuruddin, an offence punishable under s. 302 of the Indian Penal Code, and sentence them to transportation for life.

1879

EMPRESS v. ROHIMUDDIN.

BROUGHTON, J.—I also think that the prisoners ought to have been convicted of murder under s. 302 coupled with s. 149 of the Indian Penal Code. The common object of the men assembled may have been in the first instance merely the ejectment of the other party from the land, but they had retired, and at the instance of mediators had given up that object. Afterwards the other party challenged them to come on again, and the deceased man and another armed with spears put themselves in a fighting position and awaited the return of the prisoners' party. They returned, some of them also being armed with spears, and accepted the challenge. The object of those who returned, and among them were the prisoners, was *not then* to eject the others from the land, but to engage in a deadly fight with spears. A man may be a member of an unlawful assembly as defined in s. 141, and if armed with a deadly weapon may be punishable under s. 144, although no force has been used. If any force is used, he may be punishable under s. 148, and if he be a member of a band of dacoits and murder is committed, he may be punished under s. 396; and in this case there may be no deadly weapon used; if a deadly weapon is used, he may be punished under s. 398. All these instances show that the common object or intention of the assembly may be various, and that it must be judged from the proved circumstances of the case. In the present case the common object or intention of the assembly was clearly to fight in such a way that the weapons they used would be likely to cause, and probably would cause, the death of one of their number, or of one of their opponents. It is said by the Sessions Judge that the man who was slain invited or ran the risk of death, and that this brought the case within excep. 5 of s. 300 of the Indian Penal Code. But if that exception applies to the case, there appears to be no reason for excep. 4. Where there is a fight between two contending parties, it is necessary, in order to apply excep. 4, that the fight should have been sudden and without premeditation, and a fight under any circumstances comprehends the kind of consent to which the Sessions Judge alludes. Here there was a certain time between the challenge and the fight, a short time it may be, but still some time for reflection; the parties were at a distance

1879

EMPRESS v. ROHIMUDDIN.

from each other when the challenge was given, and consequently had time to consider whether they would engage in the fight with deadly weapons or not. They determined to fight, and the death of one of the men was the result. Excep. 5 appears to me to apply to circumstances of a different character, as for instance to a case of *suttee*, not to a premeditated fight. The prisoners have appealed; they say the evidence is not conclusive; and Nazir Mahomed says he had witnesses to prove an *alibi*. Witnesses were examined for the defence, and it does not appear that any were excluded. These witnesses support the case for the prosecution, which is moreover proved by the testimony of wholly independent witnesses, namely, by the men who offered to mediate, and did in fact effect a cessation of hostilities between the contending parties. The Sessions Judge rightly says that the facts are clearly proved by the witnesses on both sides. But on the question whether the offence was murder or culpable homicide not amounting to murder, I agree in thinking that the Sessions Judge was mistaken. The case in my opinion is a case of murder, and that being so, the prisoners must be sentenced under the circumstances to transportation for life.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Birch and Mr. Justice Mitter.

1878

April 4.

MAHOMED IBRAHIM AND OTHERS (PLAINTIFFS) *v.* M. B. MORRISON (DEFENDANT).*

Limitation—Onus Probandi—Chur Lands—Adverse Possession.

In a suit to recover possession of land under cultivation, when the defendant pleads adverse possession, it is under ordinary circumstances for the plaintiff to show *primâ facie* that the cause of action upon which he is suing is not barred by limitation, and not for the defendant to prove his adverse possession in the first instance.

* Regular Appeal, No. 282 of 1877, against the decree of the Subordinate Judge of Purneah, dated the 28th June 1877.