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INAYAT KH v. RAHMAT BI

TURNER, J.—The respondent's pleader, in support of his application for a review of judgment, has adduced a precedent of this Bench (1), which, it must be admitted, is in his favour. On reconsideration of the point raised, we are of opinion that the application for review should be granted. The former suit between the parties was a suit for rent cognizable by a Court of Small Causes, and the special appeal presented against the decree of the lower appellate Court in that suit was rejected on the ground that the suit was of that character. In a suit for rent instituted in a Small Cause Court the question of title would only be determined incidentally. It appears to us that it would be inequitable to rule that no special appeal lies in a suit of such a nature when instituted in a Civil Court, and nevertheless to hold that the decision of the issue of title in the trial of such a suit should finally estop the parties from raising the same issue in a suit brought to try the title. For these reasons, and following the precedent quoted, we allow the review of judgment, and inasmuch as no other point arises in the special appeal than the point already argued at the hearing of the application, we proceed to dispose of the appeal.

The only objection taken to the decrees of the Courts below proceeding on the contention that the issue respecting title was finally determined in the former proceedings, and that the parties are concluded by the former finding on that issue, we overrule the objection and dismiss the appeal with costs, including the costs of the application for review.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Turner.

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January 24

ZAHUR (DEFENDANT) *v.* NUR ALI (PLAINTIFF).*

Muhammadan Law—Pre-emption.

Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, *held* that a right of pre-emption under Muhammadan law attached to such house.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The plaintiff claimed to en-

(1) Unreported

* Second Appeal, No. 875 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 14th May, 1878, reversing a decree of Maulvi Asmat Ali Khán, Munsif of the City of Gorakhpur, dated the 23rd February, 1878.

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ZAHUR v. NUR ALI.

force his right of pre-emption under Muhammadan law in respect of a dwelling-house, situated in a certain mohalla in the city of Gorakhpur, basing his claim on vicinage. The vendee, who alone defended the suit, set up as a defence to it, amongst other things, that the plaintiff had not asserted his right of pre-emption in the manner required by Muhammadan law, that is to say, that he had not made the "*talab-i-mawasabat*," or immediate claim to the right of pre-emption, and the "*talab-i-ishhad*," or affirmation by witness, and that his claim was consequently invalid. The Court of first instance dismissed the suit, finding that the plaintiff had not complied with the requirements of the Muhammadan law. On appeal by the plaintiff the lower appellate Court was of opinion that the plaintiff had complied with the requirements of that law, and gave him a decree.

The vendee appealed to the High Court, contending that the sale of the house without the site did not give the plaintiff a right of pre-emption under Muhammadan law.

Babu *Sital Prasad Chatterji* and Maulvi *Mehdi Hasan*, for the appellant.

Lala *Lalta Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the High Court, so far as it related to this contention, was as follows:

TURNER, J.—The parties are Muhammadans, and under the law administered here they can claim pre-emption on all sales of property made between the members of their creed, when the property is of the description to which by their law pre-emption attaches. It is contended that to the property in suit pre-emption does not attach, and passages are cited from the Hedáya and other works (1) to show that, when a house is sold apart from land, pre-emption does not attach, and it is argued that, inasmuch as the seller had no right in the land, all he could sell was the house.

In fact and in law this contention appears erroneous. The seller not only sold the materials of the house, but such interest as

(1) See Baillie's Digest of Muhammadan law, pp. 473, 474, 475.

he possessed as an occupier of the soil. The house was sold as a house to be inhabited on the spot with the same right of occupation as the seller had enjoyed.

The text on which the appellant relies applies to the sale of the materials of a house or a house capable of and intended to be removed from its site. It is then equally moveable property as goods, boats, or trees, cut or sold to be cut and carried away, but it does not apply to a house sold with the right of occupation of the soil. The appeal fails and is dismissed with costs.

Appeal dismissed.

CRIMINAL JURISDICTION.

1879
January 2

Before Mr. Justice Turner.

EMPRESS OF INDIA *v.* BUDH SINGH.

Act XLV of 1860 *(Penal Code), ss.* 425, 441—*Act X of* 1872 *(Criminal Procedure Code), s.* 454—*Criminal Trespass—Mischief.*

If a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right, and without any intention to intimidate, insult, or annoy such other person, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass(1).

So also, if a person deals injuriously with property in the *bonâ fide* belief that it is his own, he cannot be convicted of mischief(2).

The mere assertion, however, in such cases of a claim of right is not in itself a sufficient answer to charges of criminal trespass and mischief. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bonâ fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, *held* that such person could not, under cl. iii of s. 454 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established.

(1) See also *In the Matter of Shistidhur Parui*, 9 B. L. R., Ap. 19; S. C., 18 W. R Cr. 25, where it was held that a person exercising a supposed right of fishery in a *bonâ fide* manner, without any intent to intimidate, insult, or annoy, or to commit an offence, could not be convicted of criminal trespass; and see also the observations of Markby, J., in *The Queen* v. *Surwan Singh*, 11 W. R. Cr. 11.

(2) See also *Bakar Halsana* v. *Dinobhandu Biswas*, 3 B. L. R., A. Cr. 17.