

divided off and taken separately his share." Having regard to what has happened, the plaintiff's property has been divided off. He is no longer a partner with the vendor. It is argued that inasmuch as the plaintiff was a partner at the time of the institution of the suit, it therefore does not matter that a partition has since taken place, particularly if the plaintiff was not the person who sought partition. Evidently the plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for partition which he himself made in the first instance. It is expressly laid down in the *Hedaya*, Chapter IV, Book 33, that it is a condition that the property of the *shafi* remain firm until the decree of the Qazi be passed; and for this reason if the *shafi* previous to the decree of the Qazi sell the house from which he derives his right of *shafa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, plaintiff's right of *shafa* was founded upon the fact that he was a partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore the reasons or grounds of his right had been extinguished before the decree of the court, and therefore the right itself is also extinguished. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

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May 4.

Before Mr. Justice Richards and Mr. Justice Tudball.

EMPEROR v. MUHAMMAD YAKUB AND OTHERS.*

Criminal Procedure Code, section 107—Security to keep the peace—Security demanded in respect of an act which was legal, although others might thereby have been led to break the peace.

To justify an order under section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquility or to do some *wrongful* act that may occasion a breach of the peace. The fact

*Criminal Revision No. 157 of 1910, from an order of Hanuman Singh Magistrate of the first class of Ghazipur, dated the 12th of March, 1910.

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that a Muhammadan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over the Muhammadan. *Shahbaz Khan v. Umrao Puri* (1) referred to.

THIS was an application in revision seeking to set aside an order of a Magistrate of the first class of Ghazipur, binding over the applicants under section 107 of the Code of Criminal Procedure. The facts which gave rise to these proceedings are fully stated in the judgment of the Court.

Mr. C. Ross Alston, for the applicants.

The Government Advocate (Mr. W. Wallach) for the Crown.

RICHARDS and TUDBALL, JJ.—The applicants seek to set aside in revision an order of Thakur Hanuman Singh, Magistrate of the first class, dated 12th March, 1910. By this order the Magistrate bound over the 15 applicants under section 107, Criminal Procedure Code.

The applicants are *julahas*, residents of Bahadurganj, in the Ghazipur district; the Magistrate describes them in his order as "the leading and more influential men" among the *julahas*.

We think it necessary to state the view of the facts we take, because such view may not be quite consistent with some passages in the order of the learned Magistrate. Nevertheless we think our view thereof is correct and that this clearly appears not only from a perusal of the police reports and evidence, but also from the order of the Magistrate himself, reading the latter as a whole.

In the year 1893 the leaders of the Muhammadans and Hindus assembled in Ghazipur and came to an agreement that they would mutually abstain, as far as possible, from doing anything to hurt each other's religious feelings. This most proper understanding seems to have worked well for a number of years. In 1908, at the *Baker Id*, *julahas* of Bahadurganj began to assert their right to sacrifice cows, probably, as the learned Magistrate says, in retaliation for the "blowing of conch" by the Hindus too near their mosque. The Joint Magistrate was on the spot and succeeded for the time being in settling the matter. The principal men of the community signed an undertaking not to kill cows. This undertaking was not complied with, and certain

persons were bound over to keep the peace. In 1909, a suit was instituted by one Yakub, claiming on behalf of the *julahas* a declaration of their right to kill cows. It is quite clear that this suit was intended to be a test case and that every step was being taken under professional advice. We think that this was a very proper proceeding and that each party ought to have facilitated a full trial on the merits which would settle once and for all, the rights of the parties, and whether such rights were being exercised in a legal manner. We say no more as the case is said to be still pending. In the *Bakr Id* of the present year two cows were actually sacrificed quietly and secretly in a mosque and a private house. This was at once reported by the person concerned to the police. The sacrifices were carried out so quietly that the Hindus did not know of them until the report was made. After this the Magistrate took action and bound over the Muhammadans.

Two witnesses, a convicted dacoit and a peon, both Musalmans, give evidence as to a cow's head being carried in public. Prior to the sacrifices the Muhammadans had given no hint of their intention to carry them out. There was no rioting. The Hindus became excited, but the Magistrate calmed them down and then proceeded to bind over the other side. He on information came to the conclusion that the *julahas* were determined to sacrifice cows and that if they were allowed to do so, the Hindus would resist and there would in all probability be a breach of the peace on future occasions.

We are quite satisfied that the Magistrate had not the smallest ground for thinking that the *julahas* (far less any of the applicants) were going to sacrifice cows in an improper manner. We mean by this in a manner unnecessarily offensive to the Hindus, *e.g.*, near a Hindu temple. As to the head of a cow being taken out and paraded in the street or thrown into a temple, we do not believe one word of it. The two witnesses who depose to it are unworthy of any credit. If such a thing had happened, there would have been abundance of proper evidence and the culprit would have been dealt with under the Penal Code. The report of the sacrifice was clearly made at the thana in connection with the test case and not for the purpose of

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irritating the Hindus who happened to be there. We are satisfied that the *julahas*, particularly the leading men among them (and the Magistrate says that the applicants are the leading men) would, under the circumstances, have been most careful to do nothing to prejudice their test case. Nothing could be more prejudicial to the case than for the Muhammadans to purposely and unnecessarily insult and irritate the Hindus. The question then is, was the Magistrate justified in making the order against the applicants simply because he was satisfied that they in conjunction with their co-religionists were determined to sacrifice and would sacrifice cows and that such sacrifice, no matter how carried out, would so irritate the Hindus that there would be a collision involving a serious breach of the peace. Counsel for the applicants contends that the *julahas* were within their legal rights, and that if they were, it was the "leading and influential men" among the Hindus who ought to have been bound over, and that, apart altogether from the legal aspect of the case it was hardly equitable to bind over only one side. We think that there is great force in this criticism. The question of the right of Muhammadans to slaughter cows came before this Court, in the case of *Shahbaz Khan v. Umrao Puri* (1). A Bench of this court held that it is the legal right of every person to make such use of his own property as he may think fit provided that in so doing he does not cause real injury to others or offend against the law even though he may thereby hurt the susceptibilities of others. At page 184 of the report the Chief Justice, says :—" We may also say that it is in the highest degree desirable that the members of the different religious persuasions who are to be found in this country should, in the observance of their religious ceremonies as well as in the exercise of their lawful rights, show respect for the feelings and sentiments of those belonging to different persuasions, and avoid anything calculated to irritate the religious susceptibilities of any class of the community. But when a question in which the ordinary rights of property are involved comes before us, we must, before we can allow those rights to be infringed, endeavour to find the existence of some principle or rule of law justifying a ruling that the wishes

(1) (1908) I. L. R., 30 All., 181.

“susceptibilities of individuals can be allowed to override such rights.” We entirely agree with those remarks, and we think they apply with great force to the present case. To justify an order under section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some “wrongful” act that may probably occasion a breach of the peace. In our judgement there was no reason to believe that any of the applicants were about to do any of these things. If the order was intended (as we think it was) absolutely to prevent the applicants and their co-religionists from killing cows the order was not justified and is illegal. The Magistrate says:—“To prevent them doing overt acts likely to cause a breach of the peace, &c., it seems to me necessary to bind the leading and more influential men among them under section 107.”

We allow the application and set aside the order. Bail bonds, &c., will be discharged.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Tudball.

BHAGIRATHI (DEPONDANT) v. JOKHU RAM UPADHIA AND OTHERS (PLAINTIFFS) AND RAM NANDAN AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Alienation by father—Lawful family necessity—Second marriage of member of the family—Marriage in the Asura form.

The first marriage of a member of a Hindu joint family is a lawful family necessity for which an alienation of family property will be justified. *Sunārabai v. Shivnarayana*, (1) followed. Every second marriage, however, is not a legal necessity. But where a Hindu's wife died while he was 23 years of age, leaving a son about 9 years old at that time, and he married a second time and for that purpose alienated family property: *Held* that the alienation under the circumstances was for lawful necessity and was binding on the son.

Per RICHARDS, J.—Bearing in mind that this (*asura*) form of marriage is quite common and that the purchase of a bride in this sense is quite common, it

* Second Appeal No. 704 of 1909, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 13th of April, 1919, modifying a decree of Harbandhan Lal, City Munsif of Jaunpur, dated the 7th of November, 1908.

(1) (1907) I. L. R., 32 Bom., 81.

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