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UDIT NARAIN MISIR v. ASHARFI LAL.

Rs. 309, that is to say in all Rs. 434, as a condition precedent to bringing the 10-pie share of mauza Bakhera to sale. The money must be paid within six months from this date. If the money is not paid within that time the suit will stand dismissed as against the appellants in respect of 10-pie of the Bakhera. If the money is paid within the time aforesaid the plaintiff will be at liberty to add this amount to his own claim against the share and sell the said 10-pie share. The appellant will have his costs of this appeal (to be paid by the plaintiff respondent).

Appeal decreed.

REVISIONAL CRIMINAL.

1916
May, 25.

Before Mr. Justice Sundar Lal.

EMPEROR *v.* AIJAZ HUSAIN.*

Act No. XLV of 1860 *(Indian Penal Code), section* 225B—*Warrant of arrest—Actual resistance necessary.*

In order to constitute an offence under section 225B of the Indian Penal Code something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest.

THE facts this case were as follows :—

One Barkat Hasan was the lambardar of a village. He made default in payment of the Government revenue. He had transferred his own share to a near relative. The accused Aijaz Husain was one of the biggest co-sharers in the village. The Tahsildar called upon him to pay the Government revenue, but he objected. Thereupon the matter was reported to the Collector. The Collector passed an order directing realization of the revenue by the arrest of the accused. A warrant of arrest was issued signed by the Naib Tahsildar on the 24th of February, 1916, returnable by the 29th. The peons were unable to execute this warrant. Time for execution was extended up to the 6th of March. In the meantime one of the other co-sharers who had been arrested for non-payment of Government revenue was released and he was asked to trace out Aijaz Husain for whose arrest the warrant was issued. This co-sharer took the

* Criminal Reference No. 336 of 1916.

chaprasis to the place where the accused was. According to the report of the chaprasi endorsed on the warrant the accused declined to be arrested, was ready to quarrel and said :—" take me, if you can, to the tahsil, I won't go."

Upon those facts the accused was convicted of an offence under section 225B of the Indian Penal Code. The case was tried summarily. No evidence was recorded. The learned Magistrate setting out in detail the case for the prosecution concludes by saying :—" I find the charge against him proved."

The Sessions Judge of Moradabad referred the case to the High Court in order that the conviction may be set aside.

The Crown was not represented.

Dr. *S. M. Sulaiman*, for the opposite party.

SUNDAR LAL, J.—This is a reference made by the Sessions Judge of Moradabad. The facts of the case are as follows :—One Barkat Hasan was the lambardar of a village. He made default in payment of the Government revenue. He had transferred his own share to a near relative. The accused Aijaz Husain was one of the biggest co-sharers in the village. The Tahsildar called upon him to pay the Government revenue, but he objected. Thereupon the matter was reported to the Collector. The Collector passed an order directing realization of the revenue by the arrest of the applicant. A warrant of arrest was issued signed by the Naib Tahsildar on the 24th of February, 1916, returnable by the 29th. The peons were unable to execute this warrant. Time for execution was extended up to the 6th of March. In the meantime one of other co-sharers who had been arrested for non-payment of Government revenue was released and he was asked to trace out Aijaz Husain for whose arrest the warrant was issued. This co-sharer took the chaprasis to the place where the accused was. According to the report of the chaprasi endorsed on the warrant the accused declined to be arrested, was ready to quarrel and said :—" Take me, if you can, to the tahsil, I won't go."

The chaprasi's report is no evidence. But I understand that the report of the Naib Tahsildar was admitted in evidence, though the Naib Tahsildar was not examined, nor did he personally know what had actually happened when the chaprasis

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went to arrest the accused. Four chaprasis had been entrusted with the execution of the warrant.

Upon those facts the accused has been convicted of an offence under section 225 B of the Indian Penal Code. The case was tried summarily. No evidence has been recorded. The learned Magistrate sets out in detail the case for the prosecution and concludes by saying:—"I find the charge against him proved." He has not found what exactly was the evidence in this particular case. The accused appears to be an influential zamindar. For some reason or other the chaprasis were unable to find him out before the 29th of November, and another co-sharer who had already been under arrest was asked to trace him out. It was in his company that the chaprasis went to arrest the accused. I think an officer armed with a warrant of arrest should have produced the warrant before the person sought to be arrested and made an attempt to arrest him, and if he had in fact offered resistance then he certainly would have been guilty of an offence under section 225 B of the Indian Penal Code. I suspect that the chaprasis were more or less friendly with the accused. They did not perform their duty by proceeding to arrest him. I do not understand what the expressions "*amadah faujdari hue*" or "*arrest me, if you can, I won't go*" were actually meant to convey. To constitute an offence under section 225 B something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest is required. The learned Magistrate in his explanation says that the accused bears the reputation of a pugnacious man. That may be so. There is apparently no evidence on the point. I think the four chaprasis entrusted with the execution of the warrant, for some reason best known to themselves, failed to arrest the accused formally and reported what is endorsed on the warrant. I think in a serious case like this, if the facts mentioned were true a charge ought to have been framed against the accused and the accused tried in the ordinary way and not summarily. I am not satisfied, and I agree with the learned Sessions Judge in this matter, that there was any resistance or obstruction offered in fact to the arrest of the accused. The fact is that the

chaprasis did not attempt to arrest him. I therefore accept the reference, set aside the conviction and sentence of the accused and direct his immediate release.

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Conviction set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Muhammad Rafiq.

1916 *May*, 26.

DHANRAJ SINGH AND OTHERS (DEFENDANTS) *v.* LAKHRANI KUNWAR (PLAINTIFF.)*

Decree for possession—Decree-holder obtaining possession of the property without executing the decree—Subsequent dispossession—Maintainability of a fresh suit—Doctrine of merger where applicable.

The doctrine of merger does not apply to a decree for ejectment. If a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree, but a decree in ejectment differs very much from other decrees.

Plaintiff obtained a decree for possession of certain immovable property which she did not put into execution for over three years, but had obtained actual physical possession over the property. She was subsequently dispossessed and brought a suit for possession.

Held, that as she had been in actual possession of the property, a fresh cause of action had accrued and her suit was maintainable being within twelve years of such dispossession.

Quaere, whether a suit is maintainable upon a decree when the execution of it has become time-barred.

THIS was an appeal under section 10 of the Letters Patent from the following judgement of a single Judge of this Court in which the facts of the case are fully set forth :—

"This appeal raises at least one very interesting question of law, about which I feel considerable doubt, but I do not think I should gain anything by taking time to consider my judgement. I am glad to think that my decision can be reviewed, if so desired, under the Letters Patent.

"The action is brought by the plaintiff for possession of certain property which belonged to her husband as a separated Hindu. Her husband died in 1904. She brought a suit for possession against the defendant in 1907 and succeeded in the first court. That judgement was affirmed by the appellate court in November, 1907. The defence had been that the land had been given orally to the defendant by the plaintiff's husband. That defence failed. It was also alleged that the defendant had been in continuous possession since 1896, but of course that would have given the defendant no right in itself. The judgement

* Appeal No. 7 of 1916, under section 10 of the Letters Patent.