

APPELLATE CRIMINAL.

1915
May 21.*Before Mr. Justice Chamier.*

EMPEROR v. HAR DAYAL AND ANOTHER.*

Criminal Procedure Code, section 408, (b) — Assistant Sessions Judge — One accused sentenced to imprisonment for more than four years — Others to a lesser period — Appeal.

When an Assistant Sessions Judge sentences one of several accused to more than four years rigorous imprisonment and others to lesser terms the appeals of all lie to the High Court even though the accused who is sentenced to more than four years does not appeal.

THE facts of this case are fully set forth in the judgement.

The Government Pleader (Babu *Lalit Mohan Banerji*) for the Crown.

CHAMIER, J.—The appellants have been convicted by an Assistant Sessions Judge of an offence under section 457 of the Indian Penal Code and have been sentenced to four years' rigorous imprisonment each. At the same trial Chhote *alias* Bhawani was convicted of the same offence and sentenced to six years' rigorous imprisonment. Chhote has not appealed. The two appellants in the first instance presented their appeals to the court of the Sessions Judge of Cawnpore. That officer forwarded the appeals to this Court on the ground that under section 408, proviso (b) of the Code of Criminal Procedure none of the convicts could appeal to the Court of Session. The question has been raised in more than one case of this kind whether an appeal against a sentence of imprisonment not exceeding four years lies to the High Court by reason of the fact that another person convicted at the same trial was sentenced to imprisonment for a term exceeding four years. Both Mr. JUSTICE TUDBALL and Mr. JUSTICE PIGGOTT have held that in such a case as this all the appeals lie to the High Court. I am of the same opinion. This case is one which comes within the terms of proviso (b) to section 408 of the Code of Criminal Procedure. The fact that the person upon whom a sentence of imprisonment exceeding four years has been inflicted has not chosen to appeal does not affect the question. On the merits I have no doubt that the appellants Har Dayal and Muhammad Husain were rightly convicted. I have

* Criminal Appeal No. 310 of 1915, from an order of Kunwar Sen, Assistant Sessions Judge of Cawnpore, dated the 4th of February, 1915.

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examined the evidence and I entirely agree with the Assistant Sessions Judge and the assessors that the two appellants were among the men who broke into the complainant's house on the night in question. Their appeals are dismissed.

Appeal dismissed.

APPELLATE CIVIL.

1915
May 20.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

ZAMIR AHMAD AND ANOTHER (DEFENDANTS) v. ABDUL RAZAQ
AND OTHERS (PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Incidents of custom, not recorded—Mohammadan Law.

A suit for pre-emption was brought both under the custom recorded in the wajib-ul-arz and Mohammadan Law; but the incidents of the custom were not recorded in the wajib-ul-arz—*Held*, that the rights were co-extensive. *Jagdam Sahai v. Mahabir Sahai*, (1) followed.

THE facts of this case are fully set forth in the judgement.

Dr. *Surendro Nath Sen*, for the appellants.

Mr. *B. E. O'Connor*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.—This is an appeal arising out of a suit for pre-emption in respect of a certain zamindari situate in the village of Katra. Originally this village consisted of two mahals, one of $11\frac{3}{4}$ biswas and one of $8\frac{1}{4}$ biswas. The $8\frac{1}{4}$ biswas mahal was subsequently divided into two mahals, one of $3\frac{1}{2}$ biswas and one of 5 biswas. The 5 biswas mahal (which is now a 20 biswa mahal), belonged, one-half to the vendors and one-half to the pre-emptors. The vendors have sold their half share to a stranger. The pre-emptors brought their suit to enforce their right, alleging (a) in paragraph three of their plaint that the "custom of pre-emption prevailed among proprietors of the *khalsa*" as entered in the *wajib ul-arz* of the village and also (b) (as set out in paragraph 6 of the plaint) that directly he "got the news of the sale he fulfilled the conditions required by the Mohammadan Law for pre-emption" and called upon the defendant to transfer the pre-empted property to him for the price entered in the sale-deed. The defendants met the case first

*First Appeal No. 10 of 1914, from a decree of C. B. Guiterman, Additional Judge of Moradabad, dated the 21st of November, 1913.