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this Court has construed section 30 of the Indian Contract Act. According to that decision the provisions of that section did not prevent a person who is employed as an agent in connexion with a wager from recovering the sums due to him by his principal. The present is a converse case. Rupees 400 is due to the principal from the agent and the agent cannot plead the illegality of the contract. The lower appellate court admitted that the agent would have to pay any profit made by him under such a contract. There is the greater reason for asking the agent to refund any sum received by him from the principal to carry out such a contract.

We decree the appeal for Rs. 400. The rest of the appeal is dismissed. Parties shall receive and pay costs of all courts according to their success and failure.

*Appeal allowed.*

*Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.*

1926 *December* 23.

RAGHUBAR DAYAL AND OTHERS (PLAINTIFFS) *v.* MULWA AND OTHERS (DEFENDANTS).*

*Act No. IX of* 1887 *(Small Cause Courts Act), Schedule II, article* 35 (ii)*—Test of applicability of—Suit for compensation for cutting trees and removing fruit*—Bonâ fide *claim of right.*

Article 35 (*ii*) of the second schedule of the Small Cause Courts Act applies only to those acts which, by the circumstances of the case, are clearly alleged or shown to be punishable by the Penal Code. Merely removing fruit or cutting trees under a *bonâ fide* claim of right, or as a result of the dispute, is not necessarily a criminal offence.

THE plaintiffs were zamindars and by virtue of a partition became sole owners of plot No. 1637. They brought a suit for the recovery of Rs. 50 as

* Appeal No. 69 of 1926, under section 10 of the Letters Patent.

damages on the allegation that the defendants illegally and without any right took away the fruits of certain mango trees standing on the plot. The defence was that the trees were planted by the ancestors of the defendants, and that the plaintiffs were never in possession. The Munsif held that the land of the plot in question belonged solely to the plaintiffs, but that the trees belonged to the defendants and dismissed the suit. On appeal the Subordinate Judge upheld this finding and also found that the defendants were in possession of the trees. The plaintiffs filed a Second Appeal to the High Court, and it was dismissed by a single Judge on the ground that the appeal was barred by section 102 of the Code of Civil Procedure. Hence this appeal under clause 10 of the Letters Patent.

Mr. *Akhtar Husain Khan*, for the appellants.

Appeal heard under order XLI, rule 11, of the Code of Civil Procedure.

WALSH, A. C. J., and BANERJI, J. :—In our view some of the cases have gone too far in holding that an act which may be *bonâ fide* and which may be done under a mistaken claim of right or which may be due to a *bonâ fide* act of negligence, yet may also be shown to have been done with a criminal motive or intention, is, therefore, a criminal act, and consequently exempt under article 35 (*ii*) of the schedule of the Small Cause Courts Act. We are not prepared to hold that merely because the facts stated are ambiguous and are, therefore, consistent with *bona fides*, although they are also consistent with *mala fides* according to the correct inference to be drawn, the act is, therefore, one necessarily of the kind referred to in this clause of the schedule. We think that something more ought to be shown, namely that the plaintiff, either by his specific allegations in the plaint,

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or in some other form, in the court of hearing, or by the nature of the evidence which he tendered at the hearing, distinctly alleged that the offence complained of was punishable under chapter XVII of the Code.

There seem to be two strong reasons why this view should be insisted upon, and why the courts should not go out of their way to apply this clause of the schedule and to treat an act as criminal which the person who complains about it has not himself treated as criminal. The first reason is that the introduction of this clause into the schedule was admittedly for the benefit of defendants who otherwise might be held guilty of criminal acts without the possibility of appealing and without a full record of the evidence. Secondly, we think that to do so does violence to the provisions of chapter IV of the Penal Code. The clause distinctly says that the act must be one which would be an offence. In our opinion, this is a clear indication that the legislature intended to exclude from the operation of this clause *bonâ fide* acts such as would be exempted from criminal responsibility under the Penal Code. As everybody knows, there are acts which are ambiguous, and which depend for their actual criminal responsibility upon the proper inferences to be drawn as to the intention of the person. The clause in question recognizes that ambiguity, and to our mind applies only to those acts which by the circumstances of the case are clearly alleged or clearly shown to be punishable by the Penal Code. We are not prepared to say that merely removing fruit, or cutting trees under a *bonâ fide* claim of right, or as the result of the dispute, is necessarily a criminal offence. The same reasoning would apply to the wilful, but not criminal, refusal to return a specific article lent, such as a book, or some other piece of movable property belonging to the

plaintiff. We have already decided today, agreeing with Mr. Justice DANIELS and dismissing an appeal from him, that where the plaint discloses no allegation of a crime, this article did not apply. We think this is the correct view. We propose to maintain it in this case, and as these cases appear to be of somewhat frequent occurrence, we have thought it necessary to give our reasons at some length.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.*

EMPEROR *v.* ALLAH MAHR AND ANOTHER.*

1927 *January* 6.

*Criminal Procedure Code, section 437—Revision—Order of discharge set aside by Sessions Judge—Reference to High Court by District Magistrate against order of the Sessions Judge.*

On a case sent up by the police under section 304 and other sections of the Indian Penal Code, the magistrate concerned, without deciding judicially that the charge was groundless, and that the evidence did not establish any case, altered the charge under section 304 to one under section 304A and then proceeded to dismiss the case.

The complainant applied in revision to the Sessions Judge, who entertained the application under section 437 of the Code of Criminal Procedure and decided that the Magistrate had not acted according to law and that the case ought to be committed to the sessions under section 304 of the Indian Penal Code.

The District Magistrate thereupon passed an order purporting to be a reference of the case to the High Court and asked the Sessions Judge to forward it. On the Sessions Judge refusing to do so, the District Magistrate sent up a reference to the High Court directly.

* Criminal Reference No. 626 of 1926.