

REVISIONAL CRIMINAL.

Before Mr. Justice E. M. Nanavutty.

1928
July, 10.

BISMILLAH AND ANOTHER (ACCUSED-APPLICANTS) v. KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY).*

Indian Penal Code (Act XLV of 1861), section 447—Criminal trespass—Physical possession necessary for an offence of criminal trespass being committed against him.

Held, that the offence of criminal trespass can only be committed against a person who is in actual physical possession of the land in question. So where the complainant was not in actual physical possession of the land in suit no offence of criminal trespass could possibly be committed against him. *Ram Prasad and another v. King-Emperor* (1), distinguished.

Mr. Akhlak Husain, for the applicants.

The Government Pleader (Mr. H. K. Ghosh), for the opposite party.

NANAVUTTY, J.:—This is an application for revision of an order of the learned Sessions Judge of Rae Bareli upholding the order of Munshi Ali Husain, Honorary Magistrate of Rae Bareli, dated the 10th of April, 1928, sentencing the applicants Bismillah and Faujdar under section 447 of the Indian Penal Code to undergo one month's rigorous imprisonment. I have heard the learned Counsel for the applicants as also the learned Government Pleader at considerable length and perused the evidence on the record. The facts out of which the present application arises are briefly as follows. On the 2nd of September, 1924, Abdul Wahab mortgaged plot No. 872 and others to Shamsher, brother of the applicants. On the 23rd of December 1926, Abdul Wahab's co-sharers sued for cancellation of the

*Criminal Revision No. 42 of 1928, against the order of Pandit Bishambhar Nath Misra, Sessions Judge of Rae Bareli, dated the 23rd of May, 1928, upholding the order of Munshi Ali Husain, Honorary Magistrate, First Class, of Rae Bareli, dated the 10th of April, 1928, sentencing the applicant under section 447 of the Indian Penal Code.

(1) (1911) 8 A.L.J., 927.

1928
 BISMILLAH
 v.
 KING-
 EMPEROR.

Nanavutti,
 J.

mortgage. On the 20th of July, 1927, their suit was decreed and on the 4th of October 1927 joint possession of plot No. 872 and of other plots was given to the complainant, who is the agent of the co-sharers of Abdul Wahab. A fortnight later on the 18th of October, 1927, the complainant Mashadi Husain brought the present complaint under section 447 against Shamsher, Bismillah, Faujdar and others.

The first point for determination is whether the complainant has proved that he was in actual physical possession of plot No. 872 in respect of which the applicants are alleged to have committed criminal trespass. There is no evidence on the record to prove that the complainant was in actual physical possession of plot No. 872. All that has been proved is that the complainant was given joint possession over this plot along with Shamsher, the brother of the applicants. The civil suit for damages, to which reference has been made in the judgement of the learned Sessions Judge, is in respect of plot No. 746 and it is not shown that this plot No. 746 is the same as plot No. 872 in the present case. No useful purpose, therefore, can be served by referring to the pleadings and the judgment in that suit for damages. The learned Honorary Magistrate discharged Shamsher of the offence under section 447. On the same ground that Shamsher was discharged the applicants were also entitled to a discharge or acquittal. Shamsher was in actual possession of plot No. 872 and through him the applicants were also in possession. The offence of criminal trespass can only be committed against a person who is in actual physical possession of the land in question. In the present case the complainant was not in actual physical possession of the land in suit and, therefore, no offence of criminal trespass could possibly be committed against him by the applicants. learned Government Pleader invited my

attention to a ruling of the Allahabad High Court in *Ram Prasad and another v. King-Emperor* (1). That ruling has no applicability to the facts of the present case. In that ruling it was laid down that a joint owner of land who entered upon the land with the intention or knowledge that he was about to do an act which was wrongful to his fellow owners had committed trespass. Here obviously the intention of the applicants was not to do any wrongful act injurious to their fellow owners, but was merely to maintain their own possession undisturbed. A person who is in joint possession, if he wishes to have actual possession, has got his remedy by bringing a suit for actual partition. The complainant instead of suing for partition and actual possession decided to take forcible possession of the plot in suit No. 872 by arbitrarily dispossessing the applicants. It is not the applicants who are at fault but the complainant in the present case. The ruling reported in 1 O.L.J., 527 has also no applicability to the facts of the present case. The complainant not being in actual possession if the plot had no right to assert actual possession by show of force. Shamsheer's mortgage had only been cancelled to this extent that the complainant was given a decree for joint possession along with Shamsheer. The ruling in 43 I.C., p. 405, has also got no applicability to the facts of the present case.

For the reasons given above I allow this application for revision, set aside the judgements of the lower courts and acquit the applicants of the offence charged. The applicants are on bail. Their bail bonds are cancelled.

Revision allowed.

1928

BISMILLAH
v.
KING-
EMPEROR.

Nanarutty,
J.