

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

1933
January, 12

BASDEO PRASAD AND OTHERS (ACCUSED-APPELLANT) v.
KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Indian Penal Code (Act XLV of 1860), sections 323 and 395—Accused charged with the offence of plucking mangoes from a grove by assaulting the watchman and beating the complainant—Accused alleging joint ownership in the grove in dispute—Offence, whether one under section 395 or one under section 323—Criminal Procedure Code (Act V of 1898), section 237—Accused charged of an offence under section 395 of the Indian Penal Code—Evidence showing that they committed an offence under section 323 of the Indian Penal Code only—Conviction, if can be altered from one under section 395 to one under section 323 of the Indian Penal Code.

Where the accused entered the grove in dispute and began to pluck mangoes and when the watchman remonstrated, assaulted him and beat the complainants and took away the mangoes and the accused alleged that by the side of the grove in dispute there was another grove and they were jointly in ownership of that grove along with the predecessor-in-interest of the complainant and that the grove in dispute was also in the joint possession of theirs and of the predecessor-in-interest of the complainant and that they collected the mangoes in this grove because they had a right to do so, the offence committed was one of causing simple hurt under section 323 of the Indian Penal Code and not an offence under section 395 of the Indian Penal Code. *Rameshwar and another v. King-Emperor* (1), distinguished.

Where the accused are charged with an offence under section 395 of the Indian Penal Code but are shown to have committed an offence of causing simple hurt only under section 323, their conviction can be altered, according to the provisions of section 237 of the Code of Criminal Procedure, from one of an offence under section 395 to one of an offence under section 323 of the Indian Penal Code.

Dr. J. N. Misra and Mr. K. P. Misra, for the appellant.

*Criminal Appeal No. 485 of 1932, against the order of Babu Jitendra Nath Ray, Sessions Judge of Rae Bareilly, dated the 30th of November, 1932.

(1) (1928) 5 O. W. N., 601.

The Government Advocate (Mr. G. H. Thomas), for the Crown.

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NANAVUTTY, J. :—This is an appeal from a judgment of the learned Sessions Judge of Rae Bareli, dated the 30th of November, 1932, convicting the appellants Basdeo Prasad and five others of an offence under section 395 of the Indian Penal Code and sentencing Basdeo Prasad appellant to six months' rigorous imprisonment and the remaining five appellants to four months' rigorous imprisonment each.

The story of the prosecution is briefly as follows :

Shortly after sunrise on the morning of the 30th of June, 1932, all these appellants entered into the mango grove in dispute and began to pluck mangoes from the trees of the grove. The watchman, Bajanna, engaged by Thakur Prasad to look after the grove, remonstrated with the accused-appellants, with the result that he was threatened and he had to run away. In the meantime Thakur Prasad and his son Munnu also came up and asked the appellants what they meant by plucking the mangoes from the trees in the grove and assaulting their watchman Bajanna. Upon this a *lathi* fight ensued and Thakur Prasad and his son Munnu were beaten and the accused thereafter gathered up the mangoes they had plucked from the trees and took them away. On behalf of the prosecution six witnesses have been examined and they fully corroborate the story of the prosecution.

The accused Sheo Ratan filed a written statement alleging that by the side of the grove in dispute there was another grove No. 737 and that he was jointly in ownership of the grove along with Bisheshwar Prasad, the predecessor-in-interest of Thakur Prasad, and that the grove in dispute No. 738 was also in the joint possession of himself and of Bisheshwar Prasad and that he collected the mangoes in this grove because he had a right to do so.

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One witness has been examined on behalf of Sheo Ratan. The learned trial Judge has disbelieved the evidence of this witness Mohan and I am not prepared to differ from him. The facts and circumstances of this case, however, point to the commission of an offence under section 323 of the Indian Penal Code and not to an offence of dacoity under section 395 of the Indian Penal Code. The appellants believed that they were collecting the mangoes from a grove belonging to Sheo Ratan in which Sheo Ratan had a half share. The first information report made at the thana also shows the commission of only a non-cognizable offence. The evidence on the record does not justify a conviction under section 395 of the Indian Penal Code. The learned Sessions Judge has referred to a ruling of this Court reported in *Rameshwar and another v. King-Emperor* (1). The facts of that case are entirely different from the facts of the present case. Here in the present case the learned Sessions Judge himself considered that only a technical offence of dacoity at best was committed. In my opinion there is no satisfactory evidence on the record of dacoity having been committed by the accused. In the ruling cited above (5 O. W. N., 601) the trial court had convicted the accused of an offence under section 395 upon the statement made by one of the accused and it was held in that ruling that the written statement of the accused was either to be accepted *in toto* or to be rejected *in toto* and that a portion of the contents of that statement could not be used to base the conviction of the appellants, as had been done by the learned Sessions Judge of Hardoi in that case. This ruling has absolutely no bearing on the facts of the present case. Under section 237 of the Code of Criminal Procedure if the accused is charged with an offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed

(1) (1928) 5 O. W. N., 601.

although he was not charged with it if the accused are not prejudiced in their defence. In the present case all that the appellants are shown to have committed is the offence of causing simple hurt under section 323 of the Indian Penal Code. I accordingly allow this appeal, set aside the conviction and sentence passed upon the appellants and acquit them of the offence charged, but in lieu thereof convict them of an offence under section 323 of the Indian Penal Code and sentence them each to undergo two months' rigorous imprisonment. To this extent this appeal is allowed. The appellants are on bail and they will surrender themselves before the District Magistrate of Rae Bareilly. The period of imprisonment already undergone by them will be deducted from this period of two months' rigorous imprisonment to which they are now sentenced.

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Appeal partly allowed.

APPELLATE CIVIL

*Before Mr. Justice Muhammad Raza and
Mr. Justice H. G. Smith*

JAI NARAIN AND ANOTHER (DEFENDANTS-APPELLANTS), v. *January, 16*
RAM DEO AND TWO OTHERS, PLAINTIFFS AND OTHERS,
DEFENDANTS (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), Order XXII, rules 5 and 10—Res judicata—Decision under Order XXII, rule 5, Civil Procedure Code, if operates as res judicata in a subsequent suit—Dismissal of plaintiff's application for substitution of names as legal representatives of mortgagor—Subsequent suit for declaration that plaintiffs are legal representatives of mortgagor, maintainability of—Application for substitution of names as legal representatives, proper rule of Civil Procedure Code, applicable to—Order under Order XXII, rule 10, if appealable—Declaratory decrees—Discretion of court to grant declaratory decrees.

Held, that where it has been decided in a proceeding under Order XXII, rule 5 of the Code of Civil Procedure that a

*Second Civil Appeal No. 304 of 1931, against the decree of G. C. Badhwar, District Judge of Fyzabad, dated the 16th of July, 1931, upholding the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Sultanpur, dated the 14th of April, 1930.