APPELLATE CRIMINAL.

Before Mullick, A. C. J., and Wort, J.

1927.

May, 24.

KING-EMPEROR

v.

BANDHU SINGH.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 141, 441 *and* 452—*Criminal trespass—unlawfully remaining on property unlawfully entered—resisting attempts of rightful owner to re-enter—liability for resistance distinct from liability for original entry.*

When a person in possession of property is forcibly ousted therefrom by a trespasser, then, unless the former acquiesces in the dispossession, the intruder does not acquire such possession as he is entitled to defend against the person ejected.

Browne v. *Dawson* (1), followed.

Where the true owner has not so acquiesced, the continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the property or as near to it as he dare to make a claim for it.

Under section 441 of the Penal Code a person who unlawfully continues in occupation of property upon which he has unlawfully entered is as liable to punishment as a person who remains unlawfully on property which he has entered lawfully provided he is actuated by one of the intentions mentioned in that section; and he is liable to be convicted in respect of such unlawful continuance even though he has already been convicted in respect of the original unlawful entry inasmuch as each time that the true owner goes upon the property or makes a claim under circumstances sufficient in law to constitute re-entry, and the trespasser opposes him with the intention required by section 441, a new offence is committed and a new liability arises.

Where a person forcibly enters upon property in the possession of another and others, under his order or directions,

*Government Appeal no. 2 of 1927, against a decision of Rai Bahadur A. N. Mitter, Sessions Judge of Gaya, dated the 5th February, 1927, overruling a decision of Babu L. Missra, Subdivisional Magistrate of Nawada, dated the 20th December, 1926.

(1) (1840) 12 A. & E. 624.

assemble to resist by criminal force or show of criminal force the attempt of the rightful owner to re-enter, then, if they are five or more in number, they constitute an unlawful assembly within the meaning of section 141, the common object being to enforce their supposed right to possession.

The facts of the case material to this report are stated in the judgment of Mullick, A. C. J.

Sultan Ahmad, Government Advocate, for the Crown.

S. M. Gupta (with him *N. K. Sinha*), for the respondents.

MULLICK, A. C. J.—This is an appeal by Government against the acquittal of eleven persons who were charged before the Subdivisional Magistrate of Nawadah with offences under sections 143 and 452 of the Indian Penal Code. Sixteen persons were placed on their trial before the Subdivisional Magistrate who acquitted five and convicted the remainder sentencing the respondents Jhaman, Kesho, Bhola and Bandhu to six months' rigorous imprisonment and Akhal, Bhattan Kahar, Ganga Ram, Chakauri, Mahadeo, Canu and Hardeyal to three months' rigorous imprisonment each under section 143 of the Indian Penal Code; no separate sentences were passed under section 452 of the Indian Penal Code.

The occurrence arose out of a dispute relating to the property of Rai Jai Mangal Prasad Sahi who died in October 1920 leaving a will by which he appointed his dewan Bundi Lal and others as trustees for the administration of his estate. He appears to have had strong religious convictions and to have dedicated all his immovable property comprising several mauzas to certain Hindu deities giving by his will directions to his trustees for the administration of the trust. The probate of the will was resisted by the testator's heirs; but the trustees finally succeeded in July 1922.

On the 28th February, 1923, the Subdivisional Magistrate of Nawadah found that the heirs who in

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these proceedings have been styled as the Sahis were in possession and he directed the trustees under section 107 of the Code of Criminal Procedure to give security to keep the peace. The trustees then applied for registration in the Land Registration Court and after a reference to the District Judge under section 55 of the Land Registration Act the question of possession was decided in their favour and delivery of possession was made by the bailiff of the Civil Court with the aid of the military police on the 8th September 1923.

It has been found by the learned Subdivisional Magistrate that thereafter the trustees remained in undisturbed possession till July 1926.

But on the 26th June, 1926, the Sahis filed a civil suit for declaration of title and possession. The plaint thereof was returned for want of adequate court-fee and a review application is now pending against the civil court's order. Next, on the 1st July, the trustees apprehending trouble, applied for police assistance and two constables were sent to the zamindari kutcherry at Singer, commonly called Singer Garh (Singer Fort).

On the 10th July, notwithstanding the presence of the constables, about 100 men belonging to the Sahis forced their way into the kutcherry and took possession with violence and turned out the servants of the trustees who were in possession.

An information was lodged before the police and some of the trespassers have been convicted

Next, on the 12th July an attack was made by the Sahis at a place called Chotha.

Next, on the 25th July Kashi Singh, a peon in the service of the trustees, went to the Singer kutcherry to see whether the Sahis were still there. He found a large number of men armed with lathis who threatened to beat him. He then retired and in mauza Chotha he met the Superintendent of Police with an Inspector and a Sub-Inspector. He laid an

information and returned with the police to the Garh. The police found the main door locked from the outside and 4 or 5 men armed with lathis on guard. The voices of a large number were heard inside the kutcherry and those outside declined to allow Kashi or his fellow servants to enter and the respondent Ganga Ram threatened to murder Kashi's companion Bishun Lal. Thereupon under the orders of the Superintendent of Police Bandhu Nepali, Akal Dusadh, Ganga Ram, Chotu and Bhattan Ram were arrested and taken away. As the Superintendent of Police had only six armed constables with him he did not consider it safe to arrest those inside the kutcherry. But he returned on the 27th July with a large force and arrested the other respondents and some others. He found them inside the "garh" where a large number of lathis and a large quantity of brickbats were being stored.

The respondents have been charged with having between the 10th and the 27th July been members of an unlawful assembly the common object of which was to commit the offence of house trespass.

They have also been charged with having between the 10th and the 27th July commited house trespass by entering into Singer Garh which was in the possession of the trustees after having made preparations for causing hurt to the employees of the trustees.

On appeal the learned Sessions Judge of Gaya has found that on the Sahis having obtained possession of the kutcherry on the 10th July the respondents could not be convicted of committing criminal house trespass between the 10th and the 25th July by being in possession under the orders of or with the leave of those who entered on the 10th July.

He has also held that as the offence of criminal house trespass could not be committed, the common object charged did not exist and, therefore, there

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could be no conviction under section 143 of the Indian Penal Code. He has therefore acquitted all the respondents.

The learned Sessions Judge finds, and I think there can be no doubt about it, that the trustees were in possession till the 10th July and that on that date their men were forcibly ejected by the employees of the Sahis among whom were the respondents Bhuttan Kahar and Chakauri.

The date when the respondents other than those two men entered the kutcherry has not been found by either Court. But they both seem to be of opinion that it was sometime after the 10th and before the 27th and that such entry was made with the leave and license or under the orders of the Sahis. I will accept that position.

Now the first question to be decided is who was in possession on the 25th and 27th July.

In my opinion it is quite clear that the trustees were in possession. "A mere trespasser" said Lord Donman, "cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title if he can, without delay, reinstate himself in his former possession." [*Browne v. Dawson* (1)]. It depends on the facts in each case what can be considered to be reasonable delay.

The owner may, if he does not acquiesce, re-enter upon the land and reinstate himself provided he does not use more force than is necessary. He must not commit a breach of the peace so as to render himself liable for an indictment under the Statutes of forcible entry and this entry will be viewed as a resistance to an intrusion upon a possession which he had never lost.

(1) (1840) 12 A. & E. 624.

Therefore, possession being with him, he may, in India, prosecute the intruder for committing criminal trespass within the meaning of section 441 of the Indian Penal Code provided the necessary intention exists and he may also if he secures a conviction apply to the Court for the ejectment of the intruder under section 522 of the Code of Criminal Procedure.

He may also resort to the preventive sections of the Code of Criminal Procedure, namely, sections 107 and 145 of that Code.

If he takes the risk of a forcible entry and uses more violence than is necessary he will not be able to plead the right of private defence; but he cannot be sued by the trespasser who has entered by force or fraud either for recovery of possession under section 9 of the Specific Relief Act or for ejectment upon the strength of his temporary prior possession. Section 9 requires legal possession and the owner who re-enters without delay has in law never lost possession. And when two persons are on a field each claiming it, he who has title is in law deemed to be in possession.

If the true owner acquiesces or acts otherwise, so that legal possession vests in the trespasser, then he must resort to the Civil Court and bring a suit either under section 9 or in ejectment, or in trespass for damages. The continuance in possession of the trespasser is a recurring wrong and constitutes a new entry every time that the true owner goes upon the land or as near to it as he dares, to make a claim to it. There is a fresh cause of action each time he is resisted although the point from which limitation will run may depend on the express provisions of the law of limitation. This I think is the law both in India and England.

Now what is the position of a trespasser who has been convicted of an offence under section 447 of the Indian Penal Code if he continues to remain on the land after a forcible entry against the true owner.

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In England the Statutes of Forcible Entry provide punishment for forcible entry "with a strong hand or with multitude of people" even when the intruder has a right. They also make forcible detainer a substantive offence if preceded by a forcible entry. Thirdly they make forcible detainer after peaceable entry an offence; (5 Richard II Ch. VII, 15 Richard II Ch. II, 8 Henry VI, Ch. IX). In my opinion section 441 of the Indian Penal Code substantially reproduces the English Law. It provides that if the trespasser having entered lawfully remains unlawfully on the property with intent to annoy he will be said to commit criminal trespass. In my opinion no less punishable is an unlawful entry followed by an unlawful continuance of occupation. It may be said that the intruder or trespasser pays the penalty once for all upon conviction for the act of entry and that he cannot be again punished for continuance of occupation. I think the answer to this is that each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by section 441 a new offence under that section is committed and a new liability arises.

In this view of the case the respondents Bhattan Kahar and Chakauri who have already been convicted for trespass upon the kutcherry on the 10th July are again liable to conviction for having resisted the owner between that date and the 27th July.

Much more so are the other respondents liable to conviction for an entry subsequent to that date and it makes no difference that they entered with the permission of those who first occupied the kutcherry on the 10th.

The discovery of the lathis and the brickbats in the kutcherry is sufficient proof of the intention to annoy the trustees and there is also clear evidence of their threatening behaviour both on the 25th and the

27th. On both these dates the resistance offered to Kashi Singh was a dispossession in law. I fully believe the evidence of the witnesses for the prosecution as to the behaviour of the respective respondents on the 25th and 27th. There can be no doubt that their conduct even in the presence of the police indicated an intention to annoy and intimidate.

The conviction under section 452 of the Indian Penal Code therefore must be upheld.

With regard to the convictions under section 143 of the Indian Penal Code the case is still clearer.

Assuming that the petitioners had a right to possession on the 25th and 27th, which in my opinion they had not, they committed an offence under section 143 of the Indian Penal Code by enforcing that right by means of criminal force. They were members of an unlawful assembly within the meaning of section 141 of the Indian Penal Code the common object being to enforce that right in a tumultuous and forcible manner.

It is true that this is not the common object charged and if we had taken a different view of the question of possession it might have been necessary to amend the charge.

But as I think that possession was with the trustees and the conviction under section 452 of the Indian Penal Code was correct I must also hold that there was no error in stating the common object to be to commit an offence under that section. In my opinion the learned Subdivisional Magistrate was right in convicting the petitioners of an offence under section 143 of the Indian Penal Code.

The sentences passed by the learned Magistrate were not unduly severe and being satisfied that the learned Session Judge has taken an erroneous view of the law I set aside the order of acquittal passed by him and restore the convictions and sentences

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entered and passed by the subdivisional Magistrate. The District Magistrate will take the necessary steps to secure the arrest of the respondents and their recommitment to proper custody.

WORT, J.—I agree.

Acquittals set aside.

Accused convicted and sentenced.

CRIMINAL MISCELLANEOUS.

Before Mullick, A. C. J., and Wort, J.

1927.

May, 31.

KRISHNA CHANDRA JAGATI

v.

KING-EMPEROR.*

Bail—non-bailable offence—grounds on which bail should be granted or refused—Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 498.

In deciding whether a person charged with a non-bailable offence should or should not be enlarged on bail during the trial the following circumstances, inter alia, should be taken into consideration, namely, the nature of the accusation; the nature of the evidence in support of the accusation; the severity of the punishment which conviction will entail; the character of the sureties, that is to say, whether they are independent or indemnified by the accused; the character and behaviour of the accused.

Tampering with the prosecution witnesses may be a good reason for refusing bail.

In re *Robinson* (1), not followed.

Nagendra Nath Chakrabarty v. *King-Emperor*(2), referred to.

*Miscellaneous criminal application against an order passed by B. K. Ghosh, Esq., Sessions Judge of Cuttack, dated the 13th May, 1927, upholding an order, dated the 6th May, 1927, passed by Babu A. C. Das, Subdivisional Magistrate of Kendrapara.

(1) (1854) 23 L. J. Q. B. 286. (2) (1923) 38 Cal. L. J. 388.