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and the Courts have got to give effect to the rule as it is worded. I think, therefore, the lower appellate Court was right in holding that the suit was not validly instituted as the plaintiff did not first pay the costs of the opposite party. The decree of the lower Court is, therefore, confirmed, and the appeal is dismissed with costs.

Appeal dismissed.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

1935
August 18

MRS. D'CUNHA AND TWO OTHERS (ORIGINAL ACCUSED), APPLICANTS *v.* EMPEROR.*

Indian Penal Code (Act XLV of 1860), section 441—Criminal trespass—Intention to annoy—Intention to assert a supposed legal right and annoyance a mere consequence—No offence committed.

In order to establish a charge of criminal trespass it is essential for the prosecution to prove the intention laid down in the section. Such intention must always be gathered from the circumstances of the case, and one matter which has to be considered is the consequences which naturally flow from the act because a man is usually presumed to intend the consequences of his own act. But that is only one element from which the Court has to discover the intention of the party who trespasses.

The real intention may be to annoy, or it may be something else, and the annoyance a mere consequence, possibly foreseen, but not intended or desired. If it is the latter, there can be no offence of criminal trespass under section 441 of the Indian Penal Code.

In execution of a mortgage decree obtained by the complainant against the first accused the complainant obtained an order for delivery of possession of the property which was a bungalow and, on August 23, 1934, the official of the Court gave him possession. The children of the first accused raised a claim disputing the right of their mother to mortgage the property which they contended had belonged to their father and on their applying for a stay of execution, the Court, in which the complainant's matter was pending, granted on the same day an order staying execution. Later in the day, the accused arrived at the bungalow, occupied the verandah and eventually got inside the house which the complainant alleged constituted an act of criminal trespass.

* Criminal Application for Revision No. 203 of 1935.

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The accused having been prosecuted for an offence of house-trespass under section 448 of the Indian Penal Code :—

Held, that the act of trespass alleged was not done with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property, but was done with the intention of asserting a supposed legal right.

Emperor v. *Lakshman*,(1) distinguished;

Ex Parte Mercer, In re Wise,(2) *Holland, In re. Gregg* v. *Holland*,(3) referred to.

CRIMINAL REVISIONAL APPLICATION against an order of D. C. Joshi, Additional Sessions Judge, Poona, in Criminal Revisional Application No. 12 of 1935, confirming an order of conviction and sentence passed by V. G. Mankar, Cantonment Magistrate, First Class, Kirkee, in Criminal Cases Nos. 266 and 280 of 1934.

Criminal trespass.

One Dinshaw Shapurji Kapadia (complainant) got a mortgage decree against Mrs. S. D'Cunha (first accused) and in execution of that decree the complainant obtained an order for delivery of possession of the property. The children of Mrs. D'Cunha then raised a claim that the mortgaged property had belonged to their father and that their mother had no power to mortgage it, and they (accused Nos. 2 and 3) applied for stay of execution and, on August 23, 1934, the First Class Subordinate Judge granted an order staying execution. On the same day the bailiff in execution of the decree gave the complainant possession of the bungalow. Later in the day, the three accused arrived at the house and it was alleged that the complainant's men were driven out of the compound and the accused subsequently got into the verandah of the house in the evening of August 23 and the next morning the complainant found that the accused had got inside the house.

The accused were subsequently charged with having committed an offence under section 448 of the Indian Penal Code in the Court of the Cantonment Magistrate, First

(1) (1902) 26 Bom. 558.
(2) (1886) 17 Q. B. D. 290.
(3) [1902] 2 Ch. 360.

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Class, Kirkee. The learned Magistrate found the accused guilty and, in convicting them, he sentenced the first and the second accused to pay a fine of Rs. 15 and the third accused to pay a fine of Rs. 10 or in default each to undergo simple imprisonment for one week. The Magistrate further directed, on application of the complainant, that the possession of the bungalow should be restored to the complainant under section 522 of the Criminal Procedure Code.

Against this order of conviction and sentence the accused preferred a revisional application to the Sessions Court, Poona, and the learned Additional Sessions Judge confirmed, on May 8, 1935, the order passed by the lower Court.

The accused applied to the High Court.

Carden Noad, with *V. N. Chhatrapati*, *R. F. Bhiladwala* and *M. S. Beg*, for the accused.

Sir J. B. Kanga, with *K. N. Koyajee*, for the complainant.

No appearance for the Crown.

BEAUMONT C. J. This is an application in revision against an order made by the Cantonment Magistrate, First Class, Kirkee, convicting the accused of criminal trespass under section 448, Indian Penal Code, and directing possession of the house alleged to have been trespassed upon to be returned to the complainant under section 522 of the Criminal Procedure Code.

The relevant facts are that the complainant got a mortgage decree against accused No. 1, Mrs. D'Cunha, and in execution of that decree the complainant obtained an order for delivery of possession. The children of Mrs. D'Cunha then raised a claim that the mortgaged property had belonged to their father, and that their mother had no power to mortgage it, and they applied for a stay of execution, and on August 23, 1934, the First Class Subordinate Judge in whose Court the matter was pending granted an order staying execution.

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That, no doubt, was an order in favour of the children, but if execution was stayed in their favour, the natural result would be that they and their mother would remain in the house. On the same day, namely, August 23, 1934, the bailiff, in execution of the decree for possession, gave possession to the complainant. Later in the day the accused arrived at the house, and it is suggested, were guilty of criminal trespass. Now the actual complaint is that the complainant's men were driven out of the compound, and according to the complainant he then told them to go home as it was raining, and he left Mrs. D'Cunha and her children in the verandah of the house in the evening of the 23rd August, and next morning he found that they had not remained in the verandah of the house, but had got inside the house, and that was the criminal trespass complained of. The complaint was lodged on August 24, and it is, I think, unfortunate that the learned Magistrate did not take the view that this was a case in which the complainant was seeking to enforce a civil right by means of the criminal Courts, and that no criminal act was shown. The amount of public time and public money which is wasted in this country by criminal complaints the sole object of which is to try and improve the position of the complainant in civil litigation is really deplorable. However, the learned Magistrate does not seem to have perceived that this was merely an attempt by the complainant to recover possession of the house without going through the procedure which would be necessary in the civil Court, and he convicted the accused of criminal trespass, and made an order for possession under section 522. The learned Magistrate finds that vacant possession was given to the complainant by the official of the Court, and then he says that from the *panchanama* it seems that all the doors were closed and locked and the accused got entrance by forcing the door which was bolted from inside. That is the only act of trespass. Then he says, " I find that this act of the accused of taking law

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into their own hands by forcibly entering into the bungalow clearly shows their intention of annoying the complainant."

Under the common law of England trespass is not a criminal offence, but it is made a criminal offence by the Indian Penal Code in this country in certain circumstances. Criminal trespass is defined in section 441 in these terms:

> "Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property . . . is said to commit 'criminal trespass'."

Now in this case there was nobody actually in occupation of the house at the time of the alleged trespass, and therefore there could not have been any intention to intimidate or insult anybody. But the learned Magistrate finds, in the passage of his judgment which I have read, that there was an intention to annoy. In my judgment, in order to establish a charge of criminal trespass it is essential for the prosecution to prove the intention laid down in the section, in this case, the intention to annoy. Intention must always be gathered from the circumstances of the case, and no doubt one matter which has to be considered is the consequences which naturally flow from the act, because a man is usually presumed to intend the consequences of his own act. But that is only one element from which the Court has to discover the intention of the party who trespasses. Was the real intention to annoy, or was the real intention something else, and the annoyance a mere consequence, possibly foreseen, but not intended or desired? If it was the latter, I am of opinion that there was no offence under the section. In the present case, inasmuch as at the time when this trespass was committed the accused had actually obtained an order staying the execution of the order under which the complainant had got possession, it seems to me that the proper inference to draw is that the accused supposed that they had a right to the possession of the property, and intended to assert that right. Whether they were right in their supposition is another matter, but I have

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no doubt that they honestly believed that they were entitled to possession of the house, and intended to assert their right. As the actual trespass which the learned Magistrate finds proved was merely getting from the verandah into the room of the house and as the complaint shows that it was raining that night, I think a further intention may well have been to keep dry, rather than to annoy anybody. However, I think the dominant intention was to assert a civil right. Sir Jamshedji Kanga on behalf of the complainant has laid stress upon the ruling of this Court in *Emperor* v. *Lakshman*.[1] In that case, the accused, who was executing a decree against his judgment-debtor, entered the judgment-debtor's compound by passing through the complainant's house without his consent and notwithstanding his protest; and it was held that the accused was guilty of criminal trespass. The case is clearly distinguishable on the facts from the present case, because there was no suggested justification for the act of trespass, though undoubtedly there was a good deal to be said for the view that the real intention of the accused was to get to the house of the judgment-debtor, and not to annoy the complainant. I do not find myself in agreement with the proposition of law enunciated by Fulton J. at the conclusion of his judgment and which he says is to be deduced from the English cases to which he refers. The proposition is in these terms (page 562):—

"... although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result."

The last of the English cases cited by Fulton J. was *Ex Parte Mercer. In re Wise*[2] and I think the learned Judge can hardly have read the case. That case arose under the statute 13 Elliz. c. 5, and the question was, whether

[1] (1902) 26 Bom. 558.

[2] (1886) 17 Q. B. D. 290.

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a voluntary settlement had been made with intent to "delay, hinder, or defraud creditors". It was argued that, inasmuch as the result of a voluntary transfer of property must inevitably be to defeat or delay the creditors of the transferor, such an intention must be presumed. Lord Esher M. R. in a forcible passage of his judgment described the proposition as monstrous. The passage is worth quoting (page 298) :—

"The argument was first put in this way—it is necessary to prove that the bankrupt, at the date of the voluntary settlement, intended to defeat and delay a creditor or his creditors generally; the necessary consequence of what he did was to defeat and delay his creditors; and, therefore, as a proposition of law, the tribunal which had to consider whether he did intend to defeat and delay his creditors was bound to find that he did. In support of that proposition dicta of great and eminent judges were cited. I will venture to say as strongly as I can that to my mind that proposition is monstrous. It is said that it is a necessary inference that a man intends the natural and necessary result of his acts. If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words 'necessary result' metaphysically, but in their ordinary business sense, and of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But, if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact."

The case of *Ex parte Mercer. In re Wise*[1] was followed by the English Court of Appeal in *Holland, In re. Gregg* v. *Holland*.[2]

In my opinion, the principle enunciated by Lord Esher M. R. is applicable to the construction of section 441 of the Indian Penal Code; if the section is to be construed in the light of the proposition which found favour with Fulton J., practically every trespass is a criminal trespass, because it can generally be said that in the natural course of events the person on whose property the trespass takes place will be annoyed. That, in my opinion, is not the effect of the

[1] (1886) 17 Q. B. D. 290. [2] [1902] 2 Ch. 360.

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section. In the present case, I am clearly of opinion that the act of trespass alleged was not done with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property, but was done with the intention of asserting a supposed legal right.

The conviction must, therefore, be set aside, and the fine, if paid, refunded. The order under section 522 is set aside; and the possession of the house, if given under that order, must be restored.

N. J. WADIA J. I agree.

Conviction set aside.

Y. V. D.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

1935
August 23

NARAYAN MUDLAGIRI MAHALE (ORIGINAL ACCUSED No. 1), APPLICANT *v.* EMPEROR.*

Child Marriage Restraint Act (XIX of 1929), section 6—Child marriage—Marriage solemnized at Goa, outside British India—Marriage no offence—Parents of the child not punishable in British India—Criminal Procedure Code (Act V of 1898), section 188—Indian Penal Code (Act XLV of 1860), section 4.

The accused were charged under section 6 of the Child Marriage Restraint Act, 1929, in that they permitted or failed to prevent the marriage of their son, who was under the age of eighteen years. The marriage took place at Goa, outside British India. The accused were tried by the District Magistrate of Kanara, where the accused were residing at the time of the charge. They were convicted of the offence. A question being raised whether the conviction was legal, it was contended by the Government Pleader that by reason of the provisions of section 188 of the Criminal Procedure Code, 1898, the conviction was legal:

Held, setting aside the conviction, that the child marriage contracted outside British India was not an offence under the Child Marriage Restraint Act, 1929, and if it was not an offence under the Act, there was no offence to which section 188 of the Criminal Procedure Code could apply.

The Child Marriage Restraint Act, 1929, is limited in its operation to British India and only strikes at marriages contracted in British India.

*Criminal Revision Application No. 179 of 1935.