Before Mr. Justice Markby.

ISWAR CHANDRA DUTT *v.* ISWAR CHANDRA GHOSE.

1872
August 7.

Compromise by parties out of Court, and without Intervention or Knowledge of their Attorneys—Costs, Taxation and Payment of.

THIS was a suit for dissolution of partnership, with the usual prayer for an account, &c. After the filing of the plaint, the suit was compromised out of Court by the parties, without the intervention or knowledge of their attorneys. The plaintiff's attorney, on becoming aware of what had been done, applied to his client for payment of his costs, and, payment being refused, the attorney applied to the Court for an order directing the taxing officer to tax his bill on scale No. 2, and for an order that the client should pay the costs when taxed.

MARKBY, J., having taken time to consider and to look into the practice of the Court, subsequently made the order in terms of the application.

Before Mr. Justice Kemp and Mr. Justice Glover.

IN THE MATTER OF THE PETITIONS OF SHISTIDHUR PARUI AND OTHERS.*

1872
July 2.

Penal Code (Act XLV of 1860), s. 441—Criminal Trespass—Intention.

An Act does not amount to criminal trespass under s. 441 of the Penal Code, unless it was committed with an intention of committing some offence, or of intimidating, insulting, or annoying some one. Where a party had been exercising a right of fishery for a considerable time, alleging a prescriptive right, the mere fact of continuing to do so after a notice of prohibition is not criminal trespass.

THE accused in this case fished in a lake or Bhowur. This lake was one resumed by Government, and subsequently released in favor of the zemindar. The izardar under the zemindar instituted against the accused a suit in the Deputy Collector's Court for rent, which was dismissed. In appeal the Judge upheld the decision of the lower Court, on the ground that the relationship of landlord and tenant did not exsist between the parties, adding that, "if the defendants continue in possession, and do not pay rent to the landlord, they may be sued for trespass."

The izardar next preferred a charge of criminal trespass against the accused before the Deputy Magistrate, alleging that notice had been served on

* Miscellaneous Criminal Case, No. 102 of 1872, against the order of the Sessions Judge of 24-Pergunnas, dated the 6th May 1872, affirming that of the Deputy Magistrate of that district, dated the 26th February 1872.

1872

IN THE MATTER OF THE PETITION OF SHISTIDHUR PARUI.

the defendants prohibiting them from fishing in the lake, and that notwithstanding it they persisted in doing so. The defence of the accused was that they had a prescriptive right to fish in the lake free of rent, which they had been exercising for a long time. The Deputy Magistrate convicted them of criminal trespass under ss. 441 and 447 of the Penal Code. The Sessions Judge in appeal upheld the conviction. The accused applied to the High Court under s. 404 of the Criminal Procedure Code to have the records sent for, and the conviction quashed as being illegal.

Baboo *Bama Charan Banerjee* for the petitioners.—No conviction can be had under s. 441 of the Penal Code without proof of an intention of committing any offence, or of intimidating, insulting, or annoying any person. The accused had been accustomed to fish in this lake for a considerable time, which is not denied by the complainant. There was an attempt made be the complainant to assess rent for the *jalkal* (right of fishery) which was unsuccessful, and instead of going to the Civil Court to establish their right either to receive rent, or to eject the defendants, preferred the present criminal charge. The defendants have been fishing under color of a right, which has been supported by actual use for a considerable length of time.

The presumption of a criminal intention entirely fails, and the conviction ought therefore to be set aside, there being no other evidence except the admited act of fishing.

Mr. *Allan* for the complainant.—Before the complait was preferred, notice had been served on the defendants to restrain them from fishing, and their conduct in continuing to do so, notwithstanding the prohibition of the proprietor, is clearly criminal trespass according to the definition given in s. 441, Indian Penal Code (Act XLV of 1860). Assuming that their former acts of fishing were not acts of criminal trespass, their continuing to fish after notice to desist is unlawful. No other proof of intention is necessary. The continuance of the act complained of in disregard of the notice is sufficient to raise the *primâ facie* presumption of a criminal intention. It is for the defendants to establish that they have the right which they allege. The zemindar is not bound to bring a suit in the Civil Court to establish his title.

The judgment of the High Court was delivered as follows:—

GLOVER, J.—I have felt some difficulty about this case, but after consideration, I think that the petitioners should succeed, and the order of the Courts below be set aside.

I do not think it necessary to go into the question as to how far the release of the "Bhowur," or lake by the Collector settled the rights of the complainant, Indrobhusan Chuckerbutty, as the action of the defendants (petitioners before us) does not seem to bring them within the purview of s. 441 of the

Penal Code. To convict under this section, it must be shown that the defendants entered upon property in the possession of another, with "intent to commit an offence," and I think that in this case the element of "intention" is wanting.

The defendants asserted, and had all along asserted, a prescriptive right to fish in the Bhowur without payment of rent, and the zemindar had already failed in a suit brought under Act X of 1859 to get rent from them, not having been able to prove that they were his tenants, or had ever paid rent to him. It may therefore be reasonably concluded that the defendants thought that they had vindicated their claims, and had a right to fish, as they had done heretofore. It cannot, I think, be presumed that they continued to fish with any intent to "commit an offence;" they considered themselves possessed of a right, to which the decision in the Act X suit had given some color, and determined to exercise it. They seem to have acted *boná fide*, and not to have exceeded their supposed privileges.

The zemindar's notice, warning them not to fish, did not change the state of things so far as s. 441 is concerned; and after what has occurred between the parties, no conviction for criminal trespass can possibly be had. The zemindar must establish his rights by a suit in the Civil Court to eject the defendants, or sue to have the defendants declared liable to pay him rent for the future.

KEMP, J.—I quite concur in this view of the case. In the definition of criminal trespass, the entry and the intention with which a party enters are the essentials. In this case it appears to me clear that the petitioners have exercised a supposed right in a *boná fide* manner. They have all along asserted their right to fish in the lake free of payment of rent, and the attempt of the opposite party to establish the relationship of landlord and tenant has signally failed. It was found that the jumma-wasil-bakis filed by the zemindar to establish tenancy and payment of rent were false. It is for the zemindar to take steps to establish his right to receive rent from the petitioners, or (if he treats them as trespassers, which he has hitherto not done) to eject them.