1897

KHETTER NATH BISWAS v. FAIZUDDIN ALI.

Court below thinks he was bound. I regret, as I said before, that we have not had the advantage of hearing the opposite view urged before us on the part of the respondent, but in the view I take, I think the Subordinate Judge was wrong. The appeal will be allowed, and the appellant will have the costs of the appeal.

BANERJEE, J.—I concur.

S. C. G. *Appeal allowed.*

APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1897 *March* 16.

PACHKAURI AND ANOTHER (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT).*

Rioting—Unlawful assembly—Right of private defence of property—Causing grievous hurt in furtherance of common object—Penal Code (Act XLV of 1860), sections 97, 99, 147, 149, 325.

The accused, receiving information that the complainant's party were about to take forcible possession of a plot of land, which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed, and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up (some of them being armed) and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt.

Held, that if the accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and using such force or violence as was necessary to prevent the aggression.

Held, also, that under such circumstances they could not rightly be held to be members of an unlawful assembly.

Queen-Empress v. *Narsang Pathabhai* (1), *Birjoo Singh* v. *Khub Lall* (2), *Shunkur Singh* v. *Burmah Mahto* (3), followed; *Ganouri Lal Dass* v. *Queen-Empress* (4), distinguished.

THE appellants were convicted by the Sessions Judge of Gya

* Criminal Appeal No. 37 of 1897, made against order passed by H. Holmwood, Esq., Sessions Judge of Gya, dated the 23rd of November 1896.

(1) I. L. R., 14 Bom., 441. (2) 19 W. R., Cr., 66.
(3) 23 W. R., Cr., 25. (4) I. L. R., 16 Calc., 206.

of committing offences under sections 147, 149 and 325 of the Penal Code, namely, being members of an unlawful assembly, using force and violence in the prosecution of the common object of that assembly, and causing grievous hurt to some one or other of the party of the complainants in furtherance of that common object. There was a dispute between certain Babhuns and Mahomedans about certain lands, of which it was found by the Sessions Judge, the Mahomedans, who were the accused, obtained possession five or six years previously, and continued in peaceful possession until October 1895. The accused, the Mahomedans, also contended that they were lawfully engaged in ploughing the land, when the complainant's party came and attacked them.

The complainants, on the other hand, alleged that their employer, in execution of a rent decree (*ex parte*) against a third party, purchased the land and obtained possession of it in September 1895, and that on 4th July 1896, a few days after, they had sowed the plot with *nowaj-dhan*; while they were engaged in ploughing the fields, the accused, with a large number of armed men, came and attacked them, and in consequence one of their men was grievously hurt and died four days afterwards. The Sessions Judge, holding that there was an unlawful assembly on the part of the accused as well as on the part of the complainants, each party attempting to enforce some right or supposed right in the property, convicted the accused of rioting with the common object of enforcing by criminal force a right to the plot of land, and sentenced them to rigorous imprisonment for one year. From this sentence the accused appealed.

Mr. *P. L. Roy* (with him Babu *Dasarathi Sanyal*) for the appellants.—The Judge has found that the appellants obtained possession of the property in dispute five or six years ago, and continued in such possession, until the day of the riot. Upon that finding the common object of the unlawful assembly fails, and under these circumstances the accused had unquestionably the right of private defence of person as well as of property. *Queen* v. *Mitto Singh* (1), *Birjoo Singh* v. *Khub Lall* (2), *Shunkur Singh* v. *Burmah Mahto* (3). It may be contended

(1) 3 W. R., Cr., 41.
(2) 19 W. R., Cr., 66.
(3) 23 W. R., Cr., 25.

1897

PACHKAURI v. QUEEN-EMPRESS.

by the opposite party that the appellants had no right of private defence on the authority of the case of *Ganouri Lal Das* v. *Queen-Empress* (1). That case is not, however, in point. It only decides that there is no right of private defence against a civil trespass. [GHOSE, J.—That case overrules the cases you have cited.] But the decision in question is not a Full Bench case, and therefore it cannot be contended that the cases I have cited are overruled by that decision. The cases I have cited lay down the true principle which should govern all such cases, that is to say, that a person is entitled to maintain his right in possession, and for that purpose he and his neighbours are entitled to use reasonable force to drive out intruders. *Queen-Empress* v. *Narsang Pathabhai* (2).

Babu *Raghunandun Prasad* (with him Mr. *Gregory*) for the Crown.—On the authority of *Ganouri Lal Das* v. *Queen-Empress* (1) the accused in this case have no right of private defence. They came armed and were prepared to fight under any contingency, and they did fight and killed one of our men. The appeal should be dismissed.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows :—

The appellants before us, Pachkauri and Jodha Singh, have been convicted by the Sessions Judge of Gya of the offences under sections 147, 149 and 325 of the Penal Code, namely, that they were members of an unlawful assembly ; that force and violence were used in the prosecution of the common object of that assembly ; and that grievous hurt was caused to some one or other of the party of the complainant in furtherance of that common object. And each of them has been sentenced to one year's rigorous imprisonment.

It appears that there was a dispute between two parties, described as the Babhuns and Mahomedans, about certain lands ; but it is found by the Sessions Judge that the Mahomedans obtained possession five or six years ago, and continued to be in peaceful possession until, at any rate, October 1895. The case for the prosecution, however, is that in execution of a rent

(1) I. L. R., 16 Calc., 206. (2) I. L. R., 14 Bom., 441.

decree (*ex parte*) obtained against a third party, the complainant's employer purchased the land, and obtained possession in September 1895; and that on the 4th July last, they (the Babhuns) were engaged in ploughing the fields, when the accused, with a large number of armed men, came and attacked them; the result of such attack being that a man belonging to their party, namely, *Dipa* Singh, was grievously hurt, and that he died in consequence thereof four days afterwards. This case is distinctly denied by the accused, who say that their party (the Mahomedans), notwithstanding the sale that took place, continued in possession of the property, and they were lawfully engaged in ploughing the lands when the complainant's party came in and attacked them; and, that in the course of the tussle which took place between the parties, Dipa Singh was hurt, and two men belonging to their side were similarly hurt. We have already said that the learned Sessions Judge has found that the party of the accused (the Mahomedans) obtained possession of the property five or six years ago, and continued in such possession; and we might now state that that officer has disbelieved the evidence adduced for the prosecution which was to the effect that they obtained *de facto* possession of the property in September 1895, that they sowed *nowaj-dhan* a few days before, and were lawfully engaged in ploughing the fields on the date of the occurrence. The learned Sessions Judge, no doubt, in one part of his judgment, throws out certain observations which would seem to indicate that he was inclined to believe that Dipa Singh had ploughed the land, but he says at the same time that there is no evidence thereof. We may therefore take it, upon the findings come to by the Sessions Judge himself in this case, that the complainant's party never obtained actual possession of the land; and we think we may well infer from the fact of the party of the accused being in possession in October 1895, that they continued in such possession until the date of this occurrence.

We observe that the learned Sessions Judge has further disbelieved the evidence for the prosecution, in so far as that evidence sought to prove that the complainant's party, who, on the day of the occurrence went to the land, were only four in number. He seems to hold, if we understand him rightly, that there was an

1897

PACHKAURI v. QUEEN-EMPRESS.

unlawful assembly on the part of the complainant, as also on the part of the accused, each party attempting to enforce some right, or supposed right in the property. But we fail to see how that position can be maintained so far as the party of the accused were concerned, if, as we hold, and as we take it, the learned Sessions Judge has in effect held, that the latter had been in possession of the property for five or six years together, and was in lawful possession of it up to the date of the occurrence. We are unable to say that the accused were upon that date endeavouring to enforce a right, or supposed right, within the meaning of section 143 of the Penal Code. It would seem (and that is what we understand the Sessions Judge's view of the evidence to be) that the party of the accused had become aware that the complainant's party wanted to take forcible possession of the land; and that, in order to protect themselves from the aggression of the complainant, they collected a large number of men, some of them being armed, and went through the village to the land in question, and while they were there actually engaged in ploughing the land, the Babhuns came up also armed (some of them) and interfered with the ploughing, and this evidently resulted in a fight between the parties, and the consequence was that Dipa on one side was grievously wounded, while two men on the side of the Mahomedans were hurt. It seems to us that, if the party of the accused were rightfully in possession of the land on the date in question, and if they found it necessary to protect themselves from aggression on the part of the complainant's party, they were justified in taking such precautions as they thought were required, and we think that in doing so they could not rightly be held to be members of an unlawful assembly. The view that we adopt in this case is supported by the cases of *Queen-Empress* v. *Narsang Pathabhai* (1), of *Birjoo Singh* v. *Khub Lall* (2), and of *Shunkur Singh* v. *Burmah Mahto* (3). And we might say that the facts of the case of *Ganouri Lal Das* v. *Queen-Empress* (4) are distinguishable from those in the present case.

Turning then to the conduct of the two appellants before us, it appears that, as far as Pachkauri is concerned, there is no evidence

(1) I. L. R., 14 Bom., 441.
(2) 19 W. R., Cr., 66.
(3) 23 W. R., Cr., 25.
(4) I. L. R., 16 Calc., 206.

upon the record to show that he used any force or violence, or made any attack upon the complainant's party; and as regards Jodha Singh all that the evidence indicates is that he had a *lathi* in his hand, and that he struck Dipa Singh with the *lathi*. But it does not appear that he inflicted the fatal blow. Therefore, so far as the first-mentioned appellant is concerned, we do not see how he could be convicted of any offence in this case; and as to the other appellant, Jodha Singh, if the fact be that the complainant's party were the aggressors, he was entitled in the exercise of his right of private defence of property to use such force or violence as was necessary to prevent the aggression; and it does not appear that he used more violence than was necessary on this occasion.

Upon these grounds we think that the conviction and sentence must be set aside.

C. E. G. *Appeal allowed.*

APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

BAHABAL SHAH (PLAINTIFF) *v.* TARAK NATH CHOWDHRY (DEFENDANT.)*

18
March

Damages, Suit for—Opium Act (I of 1878), section 9—Act XIII of 1857—Wrongful entrance and illegal search—Code of Criminal Procedure (Act X of 1882), sections 155, 156 and 165—Non-cognizable offence.

An offence under section 9 of the Opium Act (I of 1878), and not coming under section 14 of that Act, is a non-cognizable offence, and is therefore one for which by section 4 of the Criminal Procedure Code a police officer cannot arrest without warrant; and he has therefore under section 155 of the Code no authority to investigate such an offence without the order of a Magistrate; nor under section 165 can he make a search in respect of it.

* Appeal under section 15 of the Letters Patent No. 3 of 1895, against the decree of the Hon'ble Robert Fulton Rampini, one of the Judges of this Court, dated the 7th of December 1894 in appeal from Appellate Decree No. 677 of 1894, against the decree of D. Cameron, Esq., Officiating District Judge of Dinagepore, dated the 19th of March 1894, reversing the decree of Babu Ashini Koomar Gooha, Munsif of that district, dated 30th of December 1893.