

1879  
January 24.

Before Mr. Justice Pearson and Mr. Justice Turner.

ZAHUR (DEFENDANT) v. NUR ALI (PLAINTIFF).\*

*Muhammadan Law—Pre-emption.*

Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, held that a right of pre-emption under Muhammadan law attached to such house.

(Page 100.) The facts of this case, so far as they are material for the purposes of this report, were as follows: The plaintiff claimed to enforce his right of pre-emption under Muhammadan law in respect of a dwelling-house, situated in a certain mohalla in the city of Gorakhpur, basing his claim on vicinage. The vendee, who alone defended the suit, set up as a defence to it, amongst other things, that the plaintiff had not asserted his right of pre-emption in the manner required by Muhammadan law, that is to say, that he had not made the "*talab-i-mauwasabat*," or immediate claim to the right of pre-emption, and the "*talab-i-ishhad*," or affirmation by witness, and that his claim was consequently invalid. The Court of first instance dismissed the suit, finding that the plaintiff had not complied with the requirements of the Muhammadan law. On appeal by the plaintiff the lower appellate Court was of opinion that the plaintiff had complied with the requirements of that law, and gave him a decree.

The vendee appealed to the High Court, contending that the sale of the house without the site did not give the plaintiff a right of pre-emption under Muhammadan law.

Babu *Sital Prasad Chatterji* and Maulvi *Mehdi Hasan*, for the appellant.

Lala *Lalta Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the High Court, so far as it related to this contention, was as follows:

TURNER, J.—The parties are Muhammadans, and under the law administered here they can claim pre-emption on all sales of property made between the members of their creed, when the property is of the description to which by their law pre-emption attaches. It is contended that to the property in suit pre-emption does not attach, and passages are cited from the *Hedaya* and other works (1) to show that, when a house is sold apart from land, pre-emption does not attach, and it is argued that, inasmuch as the seller had no right in the land, all he could sell was the house.

(Page 101.) In fact and in law this contention appears erroneous. The seller not only sold the materials of the house, but such interest as he possessed as an occupier of the soil. The house was sold as a house to be inhabited on the spot with the same right of occupation as the seller had enjoyed.

The text on which the appellant relies applies to the sale of the materials of a house or a house capable of and intended to be removed

\* Second Appeal, No. 875 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 14th May, 1878, reversing a decree of Maulvi Asmat Ali Khan, Munsif of the City of Gorakhpur, dated the 23rd February, 1878.

(1) See Baillie's Digest of Muhammadan law, pp. 473, 474, 475.

from its site. It is then equally moveable property as goods, boats, or trees, cut or sold to be cut and carried away, but it does not apply to a house sold with the right of occupation of the soil. The appeal fails and is dismissed with costs.

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Appeal dismissed.

## CRIMINAL JURISDICTION.

Before Mr. Justice Turner.

EMPRESS OF INDIA v. BUDH SINGH.

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January 24.

Act XLV of 1860 (*Penal Code*), ss. 425, 441—Act X of 1872 (*Criminal Procedure Code*), s. 454—*Criminal Trespass—Mischief*.

If a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right, and without any intention to intimidate, insult, or annoy such other person, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass (1).

So also, if a person deals injuriously with property in the *bonâ fide* belief that it is his own, he cannot be convicted of mischief (2).

The mere assertion, however, in such cases of a claim of right is not in itself a sufficient answer to charges of criminal trespass and mischief. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bonâ fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, held that such person could not, under cl. iii of s. 454 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established.

This was an application to the High Court for the exercise of its (Page 102.) powers of revision under s. 297 of Act X of 1872. The petitioner was convicted on the 12th June, 1878, by Mr. H. B. Joyce, Magistrate of the first class, of committing criminal trespass and mischief. On appeal by the petitioner to the Sessions Judge, Mr. W. C. Turner, this conviction was affirmed on the 17th August, 1878. The facts of the case and the grounds on which the petitioner applied for revision are sufficiently stated, for the purposes of this report, in the judgment of the High Court.

Mr. L. Dillon, for the petitioner.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

TURNER, J.—It is found that the petitioner, in order to appropriate the wall of his neighbour, the complainant, to which he knew he had no right whatever, caused workmen to cut niches in the wall, to lay rafters on the wall, and to put water-spouts in the wall; and that he also caused workmen to remove bricks belonging to the complainant from the yard of the complainant and to place them on the

(1) See also *In the Matter of Shistidhur Parui*, 9 B. L. R., Ap., 19; S. C., 13 W. R. Cr., 25, where it was held that a person exercising a supposed right of fishery in a *bonâ fide* manner, without any intent to intimidate, insult, or annoy, or to commit an offence, could not be convicted of criminal trespass; and see also the observations of Markby, J., in *The Queen v. Surwan Singh*, 11 W. R., Cr., 11.

(2) See also *Bakar Hulsana v. Dinobhandu Biswas*, 3 B. L. R., A. Cr., 17.