

I do not think the nature of the offence is so serious to warrant a severe sentence. The ends of justice will be served if the sentence is reduced to the term of imprisonment already undergone and a fine of Rs. 2,000. In default of payment of fine the petitioner will undergo the unexpired portion of sentence substantively awarded to him.

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The cross revision petition praying for enhancement of the sentence awarded to the petitioner fails and is dismissed. The petitioner is allowed three weeks' time to pay the fine.

SONI, J.—I agree.

Soni, J.

REVISIONAL CRIMINAL

Before Soni, J.

JAI NARAIN and TEN OTHERS,—Convicts-Petitioners
versus

THE STATE,—Respondent.

Criminal Revision No. 699 of 1953

*Indian Penal Code (Act XLV of 1860)—Section 97—
One co-owner building on shamilat land without the consent of others— Other co-owners objecting and causing injuries to the builders—right of private defence of property—Whether available.*

1953

August 27th

A and his sons began to build on the *shamilat* land jointly owned by them and others to which other co-owners objected and caused injuries to A and his sons. Sixteen persons were tried, out of which five were acquitted and eleven were convicted under sections 148, 325 and 149, I.P.C.

Held, that the accused had committed no offence. A and his sons were committing the offence of mischief and criminal trespass which gave the right of private defence of property to the accused. One co-owner of property cannot build on it so as to oust the other co-owners.

Petition for revision under section 439 of Criminal Procedure Code for the revision of the order of Shri T. C. Gupta, Additional Sessions Judge, Rohtak, dated the 3rd June 1953, modifying that of Shri Rattan Lal Garg, Magistrate 1st Class, Rohtak, dated the 13th July 1952, convicting the petitioners.

J. G. SETHI, for Petitioners.

HAR PARSHAD, Assistant Advocate-General, for Respondent.

JUDGMENT

Soni, J.

SONI, J. Sixteen persons were sent up to take their trial for having given a beating to Narain Singh and his three sons on the 18th of February 1952. The allegation against the accused was that Narain Singh and his three sons were constructing a wall for making a *gher* on an area belonging to them for about three weeks previous to the occurrence. On the day of the occurrence they started building on field No. 148 which was *shamilat* land. The co-proprietors protested and said that it was *shamilat* land and that Narain Singh and his three sons had no right to appropriate to their exclusive use the area of this land on which they were building a wall in order to make it a part of their *gher*. On the protest being made Narain Singh and his three sons were injured. The trial Court found that five of the persons had not been properly identified as having taken part in the beating and acquitted them. The others eleven were convicted under sections 325, 149 and 148 of the Penal Code and sentenced to one year's rigorous imprisonment. On appeal the learned Sessions Judge upheld the conviction but reduced the sentences to six months' rigorous imprisonment of all the appellants before him. A revision from the judgment of the Sessions Judge has been taken to this Court.

Two points are involved, one as to who were the participants in this affair and secondly whether any offence has been committed. It is not necessary to go into the first point as in my opinion no offence has been committed. It is undoubtedly a fact that on the 18th of February 1952, the wall that was being built was on *shamilat* land and the intention of the builders was to convert the village *shamilat* land into their exclusive use by wanting to oust the other co-proprietors from it. The other co-proprietors had a right to say that this should not be done and the persons building on the land were in my opinion committing acts both of mischief as well as criminal trespass on the land. Section 97 of the Penal Code gives a right of private defence to every person subject to the restrictions contained in section 99 to defend the property, whether movable or immovable, of himself

or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. So far as mischief is concerned its definition is given in section 425 of the Penal Code. It is stated in that section—

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“Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits ‘mischief’.”

There are two Explanations to this section both of which are relevant for the present purpose. The first Explanation is—

“It is not essential to the offence of mischief that the offenders should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not”.

The second Explanation says:—

“Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly”.

“Wrongful loss” is defined in section 23 of the Code—

“‘Wrongful loss’ is the loss by unlawful means of property to which the person losing it is legally entitled. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property”.

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When the builders of the wall were intending to convert the *shamilat* land into their exclusive use to which the other proprietors were as much entitled as they themselves they were wrongfully causing loss to the others by ousting them from that property and they were also destroying the utility of the property to those others. In my opinion, therefore, the offence of mischief was being committed by the builders of the wall. In my opinion criminal trespass was also being committed. Section 441 of the Code defines criminal trespass—

“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’.”

Here the builders of the wall were certainly intending to annoy if not to insult the others and were, therefore, committing criminal trespass. In my opinion, therefore, the action of the others was covered by the provisions of section 97 of the Code. *In the matter of the petition of Khaja Mahomed Hamid Khan and another* (1) a ruling of the House of Lords is quoted in which it is said—

“It is undoubtedly settled law a co-tenant cannot maintain trespass unless there has been ouster.”

That is a quotation from the judgment of Lord Westbury in the case of *Jacobs v. Seward* (2). In this present case with which I am dealing there was certainly an ouster of the other co-proprietors. In *Emperor v. Ram Sarup and others* (3), Mr. Justice Piggott, made the following remark at page 475:—

“If the conviction, therefore, can be maintained at all, it must be upon a finding that, when the three accused began to build the walls the subject-matter of the complaint, they were unlawfully

(1) I.L.R. 3 Mad. 178

(2) L.R. 5, H.L. 478

(3) I.L.R. 36 All. 474

remaining on this land with some such intent as would render them liable to punishment." Jai Narain and
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This applies to the present case. The builders of the wall were intending to remain on this land with the deliberate intention of converting this area of land to their own use and depriving the others of the use of that land.

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Soni, J.

In *Juggeshwar Dass and others v. Koylash Chunder Chatterjee* (1) which was a case relating to movable goods the head-note states—

“Section 425 does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of right, and diminution of the value of one’s property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it.”

Though the remarks made in this case related to movable property they apply equally in the case of a nature like the present where there was certainly an invasion of the rights of the other co-proprietors of such a nature as destroyed at least the utility of the joint area which was being taken away from them. There was also a ruling quoted in the judgment of the learned Sessions Judge with which he disagreed, but in my opinion it applies to the facts of this case. The ruling is *Abdul Hadi and others v. Emperor* (2) in which a part of the head-note states—

“One of several co-sharers in constructive possession of joint land has no right to dig part of it with a view to appropriating it for his exclusive use. If he does so in the teeth of opposition by another who is also in constructive possession, the act amounts to criminal trespass. The removal of earth from part of the land will diminish its value or utility and affect it injuriously within the meaning of section 425, Penal Code, so

(1) I.L.R. 12 Cal. 55

(2) A.I.R. 1934 All. 829 (2)—35 Cr. L.J. 730

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as to constitute the act an offence of mischief and the opposite party will have every right to prevent the digging which amounts to criminal trespass and mischief.”

Learned counsel for the State said that this case does not apply to the facts of the present case as no part of the land was dug. That itself is doubtful because a wall could not be built without digging land, but it is not necessary that mischief should be said to have been committed by digging land. It can be committed in many other ways as are mentioned in the section. In my opinion the ruling applied and the learned Sessions Judge was wrong in not following it. The learned counsel for the State referred me to three rulings of the Lahore High Court, viz., *Kala Singh and others v. Kahna and others* (1), *Ahmad Gul v. Rahim Khan and others* (2), and *Ram Singh v. Malha* (3). They all related to civil cases and they decided the same point which might be given in the words of the head-note of one of these ruling. It run as follows:—

“When a joint-owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners unless they prove that the action of their joint-owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land.”

I am afraid I do not see how the ruling is applicable to the facts of the present case. The facts of the present case were that the wall was in the process of being constructed and it was at the time when the building was in progress that the other people objected and protested that the joint land should not be converted to the exclusive use of one of the co-owners. The rulings which have

(1) 60 I.C. 531

(2) A.I.R. 1926 Lah. 52

(3) A.I.R. 1935 Lah. 156

been cited by learned counsel for the State apply to facts where a building had already been built and later on a suit had been brought in which it was sought to have the building demolished. In such circumstances other considerations prevail. In my opinion the accused had a right of private defence and the convictions were in my opinion unjustified. I accept the revision and acquit them. They are already on bail. Their bail-bonds will be cancelled.

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APPELLATE CIVIL

Before Harnam Singh, J.

Mr. CHARANJIT RAI MARWAHA AND ANOTHER,—Appellants
versus

1953
—
Sept. 2nd.

M/s. GHANSHAM DASS-HANUMAN PARSHAD,—Respondent

First Appeal from order No. 32 of 1951

High Court Rules and Orders, Vol. I, Chapter 13, para 6—Ex parte proceedings against a defendant in a suit—Suit transferred by an administrative order from the Court which passed the ex parte order to another Court—Notice whether necessary on such transfer—No notice of suit given to the defendant who had been proceeded ex parte—effect of.

Held, that in view of the provisions of para 6, volume I, High Court Rules and Orders, notice has to be sent to parties when a case is transferred from one Court to another. The defendant does not cease to be a party after the *ex parte* proceedings have been ordered against him. The defendant was thus entitled to notice on the transfer of the case and it being not given, he was prevented by sufficient cause from appearing when the suit was called on for hearing, and the *ex parte* decree should have been set aside.

First appeal from the order of Shri Parshotam Sarup, Sub-Judge, 1st Class, Delhi, dated the 3rd November 1950, dismissing the application with costs.

K. L. GOSAIN, for Appellants.
D. K. KAPUR and HARNAM DASS, for Respondent.

JUDGMENT

HARNAM SINGH, J. On the 18th of October 1948, Messrs Ghansham Das-Hanuman Parshad instituted civil suit No. 624 of 1948, for the recovery

Harnam Singh,
J.