

Present : Jayewardene A.J.

1924.

SHERIFF *v.* PITCHÉ UMMA *et al.*

722,722 A.C.—P. C. Colombo, 9,453.

Criminal trespass—Sale under Partition Ordinance—Dispossession of purchaser—Intent to annoy—Order for restoration—Criminal force—Civil procedure Code, ss. 287, 325, et seq.—Criminal Procedure Code, s. 418.

A purchaser of property sold under a decree for sale in a partition action is not entitled to invoke the provisions of section 287 of the Civil Procedure Code in order to obtain delivery of the possession of such property, or to the benefit of section 325, *et seq.*, of the Civil Procedure Code, in the event of resistance to an order directing delivery of possession.

Re-entry upon land from which a person has been ejected by civil process is not criminal trespass, unless the intent to commit an offence or intimidate, insult, or annoy some person is conclusively proved.

An order under section 418 of the Criminal Procedure Code can only be justified when the Court finds that some person has been dispossessed of immovable property by the commission of an offence attended by criminal force as defined by the Penal Code.

THE accused were convicted under section 433 of the Penal Code of committing criminal trespass by entering certain premises in Wilson street in the possession of the complainant. The property formed the subject of partition action No. 8,617 of the District Court of Colombo, when a decree for sale was entered. In pursuance of this decree, the property was sold and purchased by the complainant who obtained a certificate of title. On September 4, 1924, he applied for and obtained an order for delivery of possession. On September 12 the Fiscal reported that he could not deliver possession owing to the "resistance offered by the individuals Sena Pitchi Umma (second accused), who claimed title by purchase, and one Punchi Singho, who claimed title as lessee, and refused to vacate the same." On October 3 the complainant obtained an order for delivery of possession, if need be, by breaking open the doors of the said building and removing any person bound by the decree entered in the above case who may refuse to vacate the same. On this occasion the complainant successfully obtained delivery of possession from the Fiscal, who removed certain persons, among whom were some of the accused who were in occupation. On the same day the accused broke open the doors and entered into possession of the premises. The complainant then instituted the

1924.
Sheriff v.
Pitche
Umma.

present action, when the Police Magistrate laid the case over and directed him to make an application in the District Court under section 325 of the Civil Procedure Code. The learned District Judge refused the application when made, holding that it was not open to the complainant to proceed under section 325. The prosecution was then revived. The defence was that the premises had been sold and purchased by the Colombo Municipal Council at the time of the partition decree which had been obtained by fraud. The Council had leased the property to one Zainudeen under whom the accused were in occupation. The learned Police Magistrate convicted the accused, and made an order under section 418 of the Criminal Procedure Code, directing that the complainant be restored to the possession of the premises.

J. S. Jayawardene (with him *Weerasinghe*), for the accused, appellants.

Soertsz, for complainant, respondent.

December, 16, 1924. JAYEWARDENE A.J.—

In this case the accused appellants, four in number, have been convicted under section 433 of the Penal Code of committing criminal trespass by entering certain premises in Wilson street, Colombo, in the possession of the complainant with intent to annoy, and sentenced the first and third accused to pay a fine of Rs. 50 each, the second and fourth accused to a fine of Rs. 100 each. The learned Police Magistrate has made an order under section 418 of the Criminal Procedure Code directing that the complainant be restored to possession of the premises in question. The accused appeal against their conviction and the order for restoration to possession. The facts leading up to this prosecution are as follows:— This property formed the subject of partition action No. 8,617, D. C. Colombo, where a decree for sale was entered. In execution of this decree, the property was duly sold and purchased by the complainant who obtained a certificate of title. On September 4, 1924, he applied for and obtained an order for delivery of possession. On September 12 the Fiscal reported that he could not deliver possession of the premises "owing to the resistance and obstruction offered by the individuals, Sena Pitche Umma (second accused), who claimed title by purchase, and one Punchi Singho, who claimed title as lessee, and refused to vacate the same."

Then on September 14 the complainant again moved for an order for delivery of possession "by removing all persons who refuse to vacate the same." This application was also allowed. On this the Fiscal reported that he could not deliver possession as the doors of the building were closed. On October 2 the complainant applied for an order for delivery of possession for the third time.

On this occasion he asked that possession be given, if " need be, by breaking open the doors of the said building and removing any person bound by the decree entered in the above case who may refuse to vacate the same." On this order the complainant was successful in obtaining delivery of possession from the Fiscal, who removed certain persons, among them some of the accused who were found in occupation, and placed his agent R. A. Hadi in possession on his behalf. After possession was taken, the doors of the houses standing on the premises were locked with padlocks. The complainant's agent then went away. On the afternoon of the same day the accused broke open the doors and entered into possession of the premises. The complainant then instituted the present action. The learned Police Magistrate laid the case over and directed the complainant to make an application to the District Court under section 325 of the Civil Procedure Code. The complainant accordingly applied to the District Court for a notice on the accused to show cause why they should not be dealt with under section 326 of the Civil Procedure Code. The learned District Judge refused the application, holding that according to the complainant's affidavit he had been given complete and effectual possession by the Fiscal, and that it was, therefore, not open to the complainant to proceed under section 325. He produced this order before the Police Magistrate and revived the prosecution.

The accused did not deny that they took possession as stated by the complainant and his witnesses, but they said that these premises had been sold and purchased by the Colombo Municipal Council for non-payment of rates, and that the property had vested in the Municipal Council at the time of the partition decree which had been obtained by fraud. The Municipal Council had leased the premises to one Zainudeen who was the son-in-law of the second accused, who was, living in the premises with Zainudeen's wife. The other accused were also tenants of Zainudeen. On the above facts the learned Police Magistrate convicted the accused. Objection has been taken to the convictions and the order of the Police Magistrate under section 418 on the following grounds:—First, that the order for delivery of possession issued in the partition case directing the Fiscal to place the purchaser in possession is not valid in law, and that the accused did not commit any offence by re-entering the premises; secondly, that the facts proved do not show that the accused entered into possession with intent to annoy the complainant; and thirdly, in any case, the order under section 418 of the Criminal Procedure Code for restoration to possession is *ultra vires* as no offence involving the use of criminal force was committed when entry was made.

I asked counsel for respondent under what provision of the law, either in the Partition Ordinance itself or in the Civil Procedure Code, the Court issued the order for delivery of possession. He

1924.

JAYEWAR-
DENE A.J.*Sheriff v.*
Pitche
Umma

1924.
 JAYAWAR-
 DENA A.J.
 Sheriff v.
 Pitche
 Umma

suggested that it might be brought under section 287 of the Civil Procedure Code. That section clearly has no application to purchasers under the Partition Ordinance, for it can only apply to a purchaser to whom a Fiscal's transfer has been issued under section 286, and it has been held that an order under section 287 cannot be made in favour of a person who purchases property sold by a Commissioner appointed under section 201 of the Civil Procedure Code to sell property under a mortgage decree: *Abeyaratne v. Perera*,¹ for, as Wood Renton J. remarked in that case, "section 287 is concerned only with Fiscals' sales."

It has no doubt been held by this Court (Wood Renton and De Sampayo JJ.) in *Hadjar v. Mohamadu*² that persons to whom shares have been awarded in severalty are entitled to be placed in possession of their portions under section 323 of the Civil Procedure Code, but that decision was based on the ground that a final judgment of partition "must be construed to mean that the party is entitled to the portion allotted to him and to its possession, and that it has been invariable practice to interpret a partition decree as enabling the Court to put the party in possession and to issue a writ of possession for that purpose." Whatever may be said of that judgment, it is impossible to apply the principle laid down there to a purchaser under section 8 of the Partition Ordinance. Section 287 of the Civil Procedure Code enacts expressly that an order for delivery of possession under that section may be enforced as an order falling under head (C) of section 217 (that is, to yield up possession of immovable property) the purchaser being considered as the judgment-creditor.

By virtue of this provision a purchaser at a Fiscal's sale can be treated as a judgment-creditor, but in the absence of any express provision it would be impossible to treat a purchaser under the Partition Ordinance also as a judgment-creditor and give him the benefit of the procedure laid down in section 323 and the connected sections. The Indian Partition Act provides that orders for sale under that Act should be deemed decrees under the Civil Procedure Code and be executed as a decree under the Code. In *Abeyaratne v. Perera* (*supra*) Wood Renton J. suggested a way out of the difficulty. He suggested that the mortgagor who was in possession should be noticed to show cause why he should not deliver possession to the purchaser, and he thought that as the decree bound him, the Court would have inherent power to render that sale effectual. How the order for delivery of possession was to be enforced—that is, how the inherent power was to be exercised—he did not say. In the present case the procedure indicated in *Abeyaratne v. Perera* (*supra*) was not followed, but the procedure laid down in section 287 appears to have been adopted.

¹ (1912) 15 N. L. R. 347.

² (1917) 4 C. W. R. 371.

I am unable at present to see that our Courts have any inherent power to render a sale effectual unless the power to do so is expressly or impliedly conferred by law. Even the Supreme Court, according to Hutchinson C.J., as it now exists, being constituted by the Courts Ordinance, No. 11 of 1889, has no inherent powers, but only those powers and no others which are expressly or impliedly given to it by Statute: *In re the election of a member for the Local Board, Jaffna*.¹ Until the Legislature places a purchaser at a partition sale in the same position as a purchaser at a Fiscal's sale, such a purchaser cannot, in my opinion, obtain possession if his attempt to take possession is resisted, and unless he institute an action and obtain a declaratory decree in his favour. This might be a very inconvenient procedure for a purchaser to adopt as pointed out by the Judges in *Hadjar v. Mohamadu (supra)*, but I cannot see how the inconvenience can be avoided as the law stands at present. In my judgment the issue of the order for delivery of possession to the Fiscal was *ultra vires*, and the ejection of the occupants of the houses on the premises not lawful.

1924.

JAYEWAR-
DENE A.J.*Sheriff v.*
Pitche
Umma

However that may be, some of these accused were ejected under the order, and all the accused re-entered into possession soon afterwards. Was such re-entry with intent to annoy the complainant, so as to constitute their act, criminal trespass under the Penal Code?

Even if the accused had been legally ejected, their entry would not amount to criminal trespass, unless it was conclusively proved that the accused intended to intimidate, insult, or annoy the complainant or to commit a criminal offence. As Straight J. said in *In re Govind Prasad*²: "Re-entry into or remaining upon land from which a person has been ejected by civil process or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with others, is not criminal trespass, unless the intent to commit an offence or to intimidate, insult, or annoy is conclusively proved." See 24 P. C. Colombo, 8,190, S. C. M., September, 1924.

This principle which was laid down in 1879 has never been questioned, and is accepted by commentators as good law. It is, however, argued that the accused cannot be said to have entered in assertion of any right known to the law, as the premises have been the subject of a decree under the Partition Ordinance, which is absolutely conclusive not only against the parties to the action, but also as against the whole world. The accused, as I said, are relying on the title of the Municipal Council in whose favour admittedly a vesting order has been made under section 144 of the Municipal Councils Ordinance of 1910. I am not prepared to say off hand without hearing the Colombo Municipal Council, whether the decree in the partition action

¹ (1907) 1 A. C. R. 128.² (1879) 2 All. 465.

1924.

JAYAWAR-
DENE. A. J.*Sheriff v.
Pitche
Umma*

binds it or not. The Council has bought the property for non payment of rates, and it is a matter for very serious consideration whether in these circumstances the Council is bound by the decree, especially as in recent times the theory of absolute conclusiveness of partition decrees has been considerably trenched upon: *Hamil v. The Special Officer*,¹ *Dias v. Carlinahamy*,² and *Sultan v. Sivanadan*.³ It cannot, in my opinion, be said that the right set up by the accused is so baseless that no reasonable man could believe in its existence in law. On the other hand, the right set up raises a difficult and important question which should be decided in an action to which the Municipal Council is a party, and it is inadvisable that it should be decided as a side issue in a criminal case against the tenants of the Council. Further, it has not been proved conclusively that the re-entry was with intent to annoy the complainant. The charge of criminal trespass therefore fails, and the accused are entitled to be acquitted.

There remains the third objection which questions the validity of the order for restoration to possession under section 418. To justify an order under section 418 of the Criminal Procedure Code, the Court must find (1) that the offence of which the accused was convicted was attended with criminal force; and (2) that some person had been dispossessed by the use of such force. The term "criminal force" is defined in section 340 of the Penal Code, that definition applies to the term when used in the Criminal Procedure Code, section 3 (1). The force used must therefore be to a person.

In *Sadasib Mandal v. Emperor*,⁴ the accused were convicted of rioting—the common object being the destruction of the complainant's fence, or, that is, for causing violence to a fence. They were convicted of rioting, and the Magistrate also made an order directing delivery to the complainant of the portion of land taken possession of by the accused. The Court set aside the order under section 522 which is identical with our section 418. The Court there said:—"The finding of the lower Courts clearly show that though there was the conviction under section 147, Indian Penal Code, it was not for the use of criminal force, but for causing violence in prosecution of the common object. In section 349, Indian Penal Code, the term "force" is defined as being applicable to force when used in connection with the human body; and under section 522, Criminal Procedure Code, delivery of immovable property may be made to the person who had been dispossessed of it when the accused is convicted of an offence attended by criminal force. In the present instance, violence was caused to the fencing, and not to any person. Under the circumstances the order under section 522, Criminal Procedure Code, should not have been passed,

¹ (1921) 23 N. L. R. 150.³ (1911) 15 N. L. R. 135.² (1919) 21 N. L. R. 112.⁴ (1913) 15 G. L. J. 720.

inasmuch as there was no use of criminal force to any individual. This rule, therefore, must be made absolute, and the order directing delivery of possession of the land in question to the opposite party is set aside."

1924.

JAYEWAR-
DENE A.J.Sheriff v.
Pitche
Umma.

It has been held in a number of cases referred to in the commentaries on the Indian Criminal Procedure Code that where the dispossession is not the result of criminal force, the order for restoration to possession is bad, and not warranted by law: *Sasi Bhusan Dutt v. Emperor*¹ and *Sashi Bhusan Sen v. Ananda Chandra Sen*.² It has also been held that a Magistrate exercising jurisdiction under this section must be satisfied and show clearly upon his judgment that dispossession has taken place by reason of the exercise of criminal force as defined in the Penal Code: *Ram Chandra Boral v. Jityandria*³ and *Ishan Chandra Kalla v. Dina Nath Badak*.⁴ Where an accused is convicted of criminal trespass, unless such trespass was attended by criminal force or the complainant was dispossessed by such force, an order under section 418 cannot be made. Thus in *Biswaswas Singh v. Bohela Nath Pashok*,⁵ where the accused dispossessed the complainant of his garden by breaking the padlock of its gate, but used no force or violence, and were convicted of criminal trespass, it was held that the Court had no power to order the restoration of the garden to the complainant under section 522 (418).

But as the learned Judges remarked in *Chakos Mandal v. Emperor*,⁶ if a person convicted of criminal trespass persists in remaining in the premises, in spite of the conviction, he might become liable to a further prosecution for criminal trespass. On a second conviction the accused might be committed to jail, unless he consents to leave the premises, and the complainant would thus be able to obtain possession of his property without an order under section 418. If the conviction in this case was right, it might be possible for this Court to alter the sentence of fine to one of imprisonment, unless the accused vacated the premises. As I hold that the conviction for criminal trespass is not justified in law, that question need not be considered. The convictions and the order under section 418 are accordingly set aside, and the accused acquitted.

The complainant is left to take such legal steps as he may be advised to obtain possession of the premises he has purchased.

Set aside.

¹ (1897) 1 C. W. N. cclvi.² (1898) 2 C. W. N. clxxxvii.³ (1897) 25 Cal. 434.⁴ (1879) 27 Cal. 174.⁵ (1913) 15 C. L. J. 175.⁶ (1906) 5 C. L. J. 278.