

Present : Jayewardene A.J.

1925.

MUTTAIYA v. ASIATH UMMA *et al.*

521, 521A—P. C. Kalutara, 11,463.

Criminal trespass—Ejection by civil process—Bona fide claim—Re-entry—Penal Code, s. 433.

Where the accused in the exercise of a *bona fide* claim re-entered premises from which she had been ejected in pursuance of an order made in execution proceedings which was not binding on her,—

Held, that such re-entry did not amount to criminal trespass.

A PPEAL from a conviction by the Police Magistrate of Kalutara. The first accused, a Moorish woman, and her brother, the second accused, were convicted of criminal trespass under section 433 of the Penal Code. First accused's husband owned a land called Jambugahawatta, on which was situated a house, which first accused says was built by her father in pursuance of an agreement in the *Kadutham* granted at her marriage. The husband mortgaged the land and building on primary mortgage to the firm of P. K. P. S., and on secondary mortgage to S. N. S. Sellappa Chetty. Sellappa Chetty put bond in suit and obtained hypothecary decree. At sale Sellappa purchased it. The mortgagor was in possession, and Sellappa obtained an order of Court directing the Fiscal to place him in possession. The first accused refused to give up possession, but subsequently left the place when the Fiscal came again with some Police Officers. Later the first and second accused forcibly re-entered the place, and were charged and convicted of criminal trespass.

H. V. Perera, for appellants.—Entry or re-entry upon land from which one was ejected by civil process is not a criminal offence. Annoyance is necessary (see *Sheriff v. Pitche Umma*¹).

The fact that section 328 Civil Procedure Code provides appellant a remedy does not preclude her from making an attempt to gain possession.

Order of Court and the steps taken by the Fiscal are irregular. They would only bind the judgment-debtor, and not the appellant.

The intention to exercise a *bona fide* claim is not necessary to excuse an entry so long as one does not do any act mentioned in the section.

Drieberg, K.C. (with him *Spencer Rajaratnam*), for respondent.—*Sheriff v. Pitche Umma* (*supra*) is not applicable because the appellants voluntarily surrendered possession to the purchaser.

¹ (1924) 26 N. L. R. 353.

1925.
 Muttaiya
 v. Asiath
 Umma

In the case of *Govind Prasad* cited in *Sheriff v. Pitche Umma* (*supra*) the accused remained in possession despite the partial possession given to the complainant by the officer of Court.

October 30, 1925. JAYEWARDENE A.J.—

The appellants, a Moorish woman and her brother, appeal against their convictions for criminal trespass under section 433 of the Penal Code. Several points of importance arise in the case, and it becomes necessary to state the facts which led up to the commission of the offence to properly appreciate them.

The first accused's husband was the owner of a land called Jambughawatta *alias* Jamboditotam, situated at Alutgama in the Kalutara District. There is a house on the land which is claimed by the first accused, and she says it was built by her father for her residence about fourteen or fifteen years ago in pursuance of an agreement in the *Kadutham* "E" granted at the time of the marriage. Her husband mortgaged the land with the buildings thereon on a primary mortgage to the firm of P. K. P. S. on March 13, 1919, and as a secondary mortgage to the firm of S. N. S. Sellappa Chetty on September 1, 1922. Sellappa Chetty put his bond in suit in case No. 13,471, D. C., Colombo, and obtained a hypothecary decree. In execution of the decree, and under directions contained in it, the premises were sold by a licensed auctioneer, Mr. Krishnanpillai, when Sellappa Chetty became the purchaser. He obtained conveyance "C" in his favour, No. 1,698 of May 1, 1925, executed by the Secretary on the orders of the Court. The validity of the sale and all proceedings had under the decree are questioned on the authority of the case of *Walker v. Mohideen*.¹ I do not think that these questions can be gone into in this case. I also very much doubt whether it is open to a third party, particularly to one who makes no claim under the mortgagor, to question the validity of the sale on the ground of irregularities committed in the mortgage action. On obtaining his conveyance the purchaser applied for a writ or order of possession on the allegation that the mortgagee was still in possession of the property purchased. This was allowed, and the Court stayed an order for the delivery of possession which recited that the mortgagee was in possession of the land conveyed to the purchaser, and directed the Fiscal or his officers to put the said purchaser (the plaintiff above named) in possession, and, if need be, to remove any person bound by the decree who refuses to vacate the same. This order is identical in form with the orders for delivery of possession which are issued to purchasers at Fiscal's sales, when the property is in the occupancy of the judgment-debtor under section 287 of the Civil Procedure Code. See schedule II., form No. 57. The purchaser in the present case was not a purchaser at a Fiscal's sale, and was therefore not entitled

¹ (1924) 26 N. L. R. 310.

1925.

JAYEWAR-
DENE A.J.—
Muttaiya
v. Asiath
Umma

to an order of this kind. The procedure to be followed by a purchaser who buys mortgaged property when sold by an auctioneer was indicated by this Court in *Abeyratne v. Perera*.¹ There the Court clearly laid down that a purchaser at an execution sale held by an auctioneer under section 201 of the Civil Procedure Code is not entitled to an order under section 287, directing the Fiscal to deliver over to him possession of the property purchased, as section 287 is concerned with Fiscal's sales only. But it added that the Court has an inherent power to direct delivery of possession to the purchaser and render the sale effectual. This it thought should be done by calling upon the judgment-debtor to show cause why the purchaser should not be put in possession of the property purchased. This procedure was not adopted, and an order for delivery of possession was made straightaway directing the Fiscal to put the purchaser in possession, and, if need be, to remove any person bound by the decree. As the purchaser was not entitled to such an order, the Court in issuing it was acting *ura vires*. When the Fiscal went with the writ he found the judgment-debtor's wife, the first accused, in possession. She refused to give up possession. The Fiscal reported that he was not able to execute the order for delivery of possession as the first accused and another "who were there refused to allow possession to be delivered and they were not bound by the decree even to be removed." The first accused in an affidavit filed of record (P 3) says that she set up a claim to the house and refused to surrender it for her husband's debts. A few days later the Fiscal, at the request of the purchaser's proctor, went again to deliver possession, but failed to do so as he found the doors of the house closed. The Fiscal so reported to Court. Then, on an application made by the purchaser, the Court authorized and empowered the Fiscal to break open, if necessary, the front door of the premises in question and deliver possession of the said premises to the plaintiff, and, if need be, to seek the assistance of the Police to execute the order. On the receipt of this order, the Fiscal, accompanied by an Inspector of Police, some constables, the village headman, and others, went to the house where the first accused and some others were staying and proceeded to remove the furniture in the house and to give possession of the premises to the purchaser's agent. The first accused herself left the house. It is necessary to consider the circumstances under which she left the house. The prosecution says she went out quite voluntarily. The evidence of the Fiscal's clerk and of the Police Vidane, a witness called for the prosecution, discloses what happened. The Fiscal's clerk explained his "errand." The first accused refused to go, saying the house was her's. She was told that she must institute a case if she was dispossessed.

¹ (1912) 15 N. L. R. 347.

1925.

JAYEWAR-
DENE A.J.*Muttaiya*
v. Asiath
Umma

The clerk persisted in his request that the first accused should leave the house, and then she left the premises. The complainant's men proceeded to put her things out. All her things were put on the road outside except a few heavy articles. She was asked to sign a paper "G" which contained a statement that the purchaser's agent had received the possession of the buildings, trees, and the land Jambugahawatta at Alutgama. This the first accused is said to have signed with a cross. The first accused's account of what happened is, however, different. She says the complainant came with the Fiscal, the Police Vidane, the Inspector of Police, and constables and demanded the house. She refused and showed her documents of title. They broke her things and threw them out. "The Police Inspector made a loud noise and stamped his feet and threatened to handcuff and take me to the station." The Police Vidane brought a pen and touched her hand and went away. She denied having put her mark to document "G." That same evening the first accused's brother sent a telegram "L" to the Assistant Government Agent, Kalutara, complaining that the Inspector of Alutgama was breaking her doors and taking furniture and asking for protection. Taking all the facts and circumstances of the case as appearing in the record, I am unable to agree with the contention of complainant's counsel that the first accused surrendered the premises voluntarily. I believe that she was overawed by the display of force and frightened by the attitude of the Police Officers, and left the house in order to avoid being dragged out of it, and it may be, taken to the Police Station and prosecuted. For the order for delivery of possession which the Fiscal held in his hands was to break open the front door and deliver possession to the purchaser, if need be, with the assistance of the Police. It did not direct the removal merely of the judgment-debtor or of those bound by the decree; its terms were absolute, and it might be construed as an order to give possession by removing all persons found in the house whether bound by the decree or not.

Such an order is, in my opinion, entirely unauthorized in law, and should never have been issued. It is not strange that on the authority of such an order the Police Inspector threatened to handcuff the first accused and take her to the station if she did not surrender possession of the house. A person surrendering possession in these circumstances cannot be said to do so voluntarily. I find, therefore, that the first accused did leave the house, but that she gave up possession under compulsion, and not, voluntarily.

The first accused re-entered the next morning and drove out the complainant and the purchaser's agent. He says that the second accused pulled him out by the hand, struck him on the back, and ordered him out. The first accused asked him not to remain there. For this forcible entry the accused have been charged with criminal trespass. In answer to the charge the first accused set

up a claim to the house, which she said her father had built for her residence according to the agreement in the *Kadutham* "E," and that she had occupied it with her husband ever since. At the trial counsel for the accused desired to lead evidence to prove that the first accused's father had built the house, but this was not allowed by the learned Police Magistrate, who said that that fact was not material to the present charge. In his judgment the Police Magistrate says that two questions arise in the case: first, whether the accused acted *bona fide* in re-entering the house, that is, in the belief that the first accused was entitled to it and with the sole intention of regaining possession, and second, whether having been ejected by the Fiscal and having other remedies prescribed by law, she could be taken to have acted *bona fide*. He answers the questions in the negative. He holds that the accused had a remedy under section 328 of the Civil Procedure Code, under which she could have asserted and obtained her rights, and that she is thereby precluded from taking possession by force on any plea of *bona fides*. Therefore, she must have known that by doing so she would annoy the purchaser, who had been put into possession by order of Court. He convicted the accused. It is, however, not open to the accused to proceed under section 328 of the Code. It has been held by this Court in several cases that the provisions of Chapter XXII, dealing with the execution of decrees and orders, except sections 336-354, which contain "General Provisions," are inapplicable to orders for sale passed under section 201 of the Code. See *Suppramaniam Chetty v. Fernando*,¹ *Peris v. Silva*,² *Mohideen v. Isey*,³ *Falkner v. Zoysa*,⁴ *Walker v. Mohideen (supra)*. Section 328 enables a person other than the judgment-debtor who is dispossessed of property in execution of a decree and this has been held to include a purchaser at a Fiscal's sale (*Silva v. de Mel*⁵) to follow the summary procedure laid down there. The first accused not being a person dispossessed in execution of a decree or an order for delivery of possession following on a Fiscal's conveyance is therefore not entitled to proceed under section 328. The reason given by the learned Police Magistrate for inferring that the accused did not act *bona fide* disappears. It is impossible to say that the accused had no right whatever to the possession of the house in dispute. On reference to the *Kadutham* "E" I find that in it "the bride's father promised to build and give at his own expense a house on the land called 'Jamboditotam' (Jambugahawatta) at Alutgama Veedia at a cost of Rs. 10,000 for his daughter to reside in."

The first accused swears that her father built the house in pursuance of the promise fourteen or fifteen years ago. She wished to call evidence to prove this fact, but she was not allowed to do so. If

¹ (1917) 4 C. W. R. 33.

³ (1922) 24 N. L. R. 239.

² (1918) 21 N. L. R. 117.

⁴ (1924) 26 N. L. R. 449.

⁵ (1915) 18 N. L. R. 164.

1925.

JAYEWAR-
DENE A.J.

Muttaiya
v. Asiath
Umma

1925.

JAYEWAR-
DENE A.J.*Muttaiyu*
v. Asiath
U'mma

the land on which the house stands belongs to her husband, the judgment-debtor, the first accused has at least a right to retain possession of the house. Under Muhomedan law the property of each spouse is separate. Further, the charge on which the accused have been convicted discloses no offence. A charge framed under section 433 must state the intent with which the entry is made. If the evidence discloses the intent of the accused clearly, and the Court finds such intent proved, it may be the defect in the charge might be remedied, otherwise such a faulty charge avoids a conviction based on it.

In the present case the Police Magistrate deduces the intent from certain premises. I do not think the inference is justified. The intent attributed to the accused must be his primary intention I do not think her intention was to "intimidate, insult, or annoy" the purchaser. I find that she re-entered to assert a claim to the property which she believed to be a good one and well founded. By re-entering the house in assertion of that right she committed no offence. She had a *bona fide* claim to the house, or one she believed to be so. She was compelled to leave the house. If she had resisted the writ, although issued *ultra vires*, she would, I have no doubt, have been removed from the house by the Fiscal and the Police Officers present there to execute the order, and she might also have been prosecuted for resisting and obstructing a public servant. She asserted her claim. This was disregarded, and she acted wisely in leaving the premises for the nonce. As the order did not bind her, and could not have been legally enforced against her, she committed no offence in re-entering the premises she left in the circumstances stated above.

The convictions are set aside, and the accused acquitted.

Accused acquitted.

