

1882

TATIA
v.
SADASHIV.

Chunder Roy and others (1) and *Hari Vasudev v. Mahadaji Apaji* (2) in addition to the cases referred to in the judgment of the High Court.

The Hon. *V. N. Mandlik* for the respondent.

SARGENT, C.J.—The District Judge was wrong in holding that mere non-payment of rent was sufficient to constitute adverse possession: *Dadoba v. Krishna* (3); *Rungo Lall Mundul v. Abdul Guffoor* (4). The decree must, therefore, be reversed, except as to damages, which must be varied by substituting five rupees on account of moveables in the house for rupees twenty, and plaintiff's claim must be rejected (except as aforesaid) with costs throughout.

Decree reversed.

(1) 6 Calc. W. R., 218.

(3) *Supra*, p. 34.

(2) 5 Bom. H. C. Rep., 85, A.C.J.

(4) I. L. R., 4 Calc., 314.

APPELLATE CRIMINAL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

EMPRESS v. TUCKER, NORMAN AND THOMPSON.*

1882
September 28.

Indian Penal Code (XLV of 1860), Sections 151 and 188—Unlawful assembly—Assembly of five or more persons—Lawful command—Criminal Procedure Code (X of 1872), Sections 137 and 480—Officers superior to officers in charge of a police station—Legality of their order—Evidence—Opinions of policemen.

Where the object of only three persons was to draw a crowd and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, held that the gathering constituted an assembly of five or more persons within the meaning of section 151 of the Indian Penal Code (XLV of 1860), and that a refusal to disperse after being lawfully commanded to disperse rendered every member of the gathering liable to conviction under the said section.

An order given by an officer superior in rank to an officer in charge of police stations commanding an assembly of five or more persons likely to cause a disturbance of the public peace to disperse, is a lawful order within the meaning of section 480 of the Code of Criminal Procedure (X of 1872).

The opinions of policemen as to whether certain acts would lead to a breach of the peace is relevant; and the Court itself may properly look to the surrounding circumstances to enable it to form an opinion on the subject.

* Application for Revision, No. 186 of 1882.

THIS was an application to the High Court for a transfer to itself of the case in which the accused were convicted by Dosabhai Framji, C.S.I., Second Presidency Magistrate, whose judgment states the facts as follows :—

In this case the defendants, Mr. F. De Lantour Tucker, styling himself as a Major, and the defendants, Mr. A. Norman and Miss Thompson, styling themselves Lieutenants, in what is called "The Salvation Army", are charged, at the instance of the Commissioner of Police, (1) with having on the 24th day of September, 1882, at Rombay, knowingly joined and continued in an assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly had been lawfully commanded to disperse; and (2) with having on the aforesaid date knowing that an order had been lawfully promulgated by a public servant directing them to abstain from a certain act, disobeyed that order, and thereby caused or tended to cause a riot or affray; and (3) with having behaved in a disorderly manner in a public place. The facts of the case, as they appear from the evidence, are these: For some years past a number of persons have organized themselves in England into an association which is called the Salvation Army. The object of this association, or army as it is called, is the same as the several missionary bodies in England and in this country have in view, but the mode by which it seeks to work is different from the quiet and unobtrusive manner of the missionaries generally. Some members of this army have come to Bombay and commenced to work their mission. I will not relate here what happened on the first day of their procession, but at once refer to what took place on Sunday last and gave rise to the subject of this charge. Major Tucker applied to Superintendent Brewin to know whether his party would be allowed to parade the streets in procession, singing and carrying their banner. On receipt of that application, Mr. Smith, the Deputy Commissioner of Police, and Superintendent Brewin called upon Major Tucker, and informed him that under instructions from the Commissioner of Police his request could not be granted. Major Tucker then said that that refusal would involve his acting against the orders given him. Mr. Smith then warned Major Tucker of the consequences that would ensue to all who took part in the procession if they insisted on going out in defiance of the orders of the Commissioner of Police. Major Tucker replied that he was prepared to abide by the consequences of his acts. Shortly after this interview the said officers again called upon Major Tucker and read to him the written orders of Sir Frank Souter forbidding the procession parading through the streets. Major Tucker declined, as before, to obey the order, and at 5 o'clock in the afternoon, accompanied by Lieutenant Norman and Lieutenant Miss Thompson, he marched out of his house with an unfurled banner in his hand, and all of them singing. The police authorities were, of course, on the alert. Mr. Brewin, who had already proceeded to the head-quarters of the Salvation Army, accompanied the procession, round which a crowd gathered and increased as it went along. When the procession arrived near the junction of the five roads it was met by Mr. Smith, the Deputy Commissioner of Police, who desired Major Tucker and Lieutenants Norman and Thompson, who were singing, to desist from doing so. Major Tucker replied that he could not comply with the order, and continued marching and singing. The

1882

 EMPRESS
 &
 TUCKER.

1882

EMPRESS
v.
TUCKER.

Deputy Commissioner then placed himself in front of Major Tucker, and addressing him and the fifty or sixty people who had assembled around him ordered them in the name of the Queen-Empress to disperse. Major Tucker said he would not obey the order, and he and his colleagues did not obey the order. The accused were then arrested by order of the Deputy Commissioner, and the crowd, which had accompanied them, then dispersed. Such being the facts of the case it remains for the Court to examine whether the accused have by their conduct infringed the requirements of the law. By section 77 of the Act XIII of 1856 the Commissioner of police is authorized to regulate the conduct of all assemblies and processions in the public roads, streets, or thoroughfares, prescribing the routes by which such processions may pass. Under the authority of this section Sir Frunk Souther had forbidden the Salvationist procession parading the public roads and streets with their banner and singing. This order was personally communicated to Major Tucker in the clearest possible manner by an officer second only to the Commissioner himself, but Major Tucker said that he would not obey, and, as events showed, he did not obey. When the procession had thus in wilful defiance of the express orders of the Commissioner of police proceeded to a considerable distance, the Deputy Commissioner met them, and fearing a disturbance of the public peace ordered the accused, who were singing and carrying their banner, to disperse; but they refused, and continued to walk on as before. For thus knowingly continuing in an assembly of five or more persons likely to cause a disturbance of the public peace after such assembly had been lawfully commanded to disperse, and for 'disobedience to an order duly promulgated by a public servant—a disobedience which was calculated to produce a riot or affray—the accused stand charged under sections 151 and 188 of the Indian Penal Code (XLV of 1862). Under section 151 the assembly must consist of five or more persons. Major Tucker has contended that his party consisted only of three, and that Mr. and Mrs. Gladwin were at a considerable distance from them. It is true that they were so, and I dare say they purposely kept themselves at a distance, probably thinking that, if they remained behind, the number required to sustain the charge would not be made up. But from the fact of Mr. Gladwin having dressed like the salvationists and Mrs. Gladwin having wore the ribbon with the word "Mookti-fouj" upon it, it is evident that they were keeping themselves along with the procession, but it is possible they were not desirous of sharing the fate of the accused, and, therefore, kept themselves at a respectable distance from them. But while I make this remark I must say that I do not think it necessary for the purpose of this charge to show whether the Rev. Mr. and Mrs. Gladwin or any particular person or persons were in the assembly ordered to disperse. It is in evidence that there were fifty or sixty persons assembled immediately around the accused. Five or more persons going along the road, not together but singly, might meet A and B wrangling and fighting and stop to look on; the police officer on the beat fearing a disturbance of the public peace orders the assembled crowd to move on or disperse. Disobedience to such a command is, I believe, contemplated by this section, and the accused with whom had assembled fifty or sixty persons constituted an assembly of five or more persons. But I should state that it is also necessary to prove that the assembly which was ordered to disperse was such as was likely to cause a

disturbance of the public peace, and that the disobedience must cause or tend to cause some of the injurious results named in section 188 of the Penal Code. On this point the evidence of the Deputy Commissioner of Police, an officer of great experience and fifteen years' standing in the police force, as well as that of Mr. Brewin, another experienced officer of ten years' standing, is very clear. Mr. Smith has told us that since the arrival of the Salvationists, and since they have commenced to preach here, there has been a stir in the Mahomedan community, and from all that has come to his knowledge he was of opinion that processions, like the one which the Salvationists wished to have, were calculated to cause a disturbance of the public peace. He has given his reasons for forming that opinion, and it is not necessary to recapitulate them here. In one place, he says, these processions are not desirable in the interests of public peace: "they might lead to bloodshed, as such matters are cinders that might flame at any moment." Mr. Brewin has stated that if the Salvationists had been allowed to proceed and pass through the Mahomedan quarters of the city with a banner with the words "Blood and Fire upon it", there would have been a disturbance of the peace. Inspector Holmes has stated that if the Mussulmans came to know that the Salvationists were a religious body, a riot would unquestionably occur. Major Tucker has by his cross-examination of the witnesses elicited that the crowd which followed him and his colleagues was orderly; but the contention of the prosecution, that this orderliness was due to the precautions and presence of a strong police force, is entitled to great weight. Then, again, Major Tucker has urged upon the attention of the Court the extreme undesirability on their part to be partizans in a riot or affray. I grant that the accused would not wish for such a result. But the explanation to section 188 says: "It is not necessary that the offender should intend to produce harm or contemplate his disobedience as likely to produce harm; it is sufficient that he knows of the order which he disobeys and that his disobedience produces or is likely to produce harm." Then, again, the illustration given under the same section is as follows:—"An order is promulgated by a public servant lawfully empowered to promulgate such order directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order and thereby causes danger of riot. A has committed the offence defined in the section." It will thus be seen what the Legislature has intended. An act, though lawful in itself, is prohibited on account of the danger which it may cause to the public tranquillity. That the procession of the Salvationists, though harmless in itself, was such as would cause danger to the public tranquillity, is amply proved by the evidence. If the police had not accompanied the processions of the Salvationists, if the Moulvi dressed in the skin of a wild animal had been allowed to follow Major Tucker and his colleagues without the police guard, the Salvationists would have soon found out what dangerous elements were lurking around them. Mr. Mody, who has been called as a witness for the defence, has strongly supported the case of the prosecution. He has told us what effect his preaching had upon the people of other creeds, how they have hooted and beaten him, and even "drawn blood from his nose", and how some of the professors of another religion, seeing the religion of the ruling race to be the same as that of the missionary preachers, extended their ill-will from the preachers to the Government itself, and took to

1882

 EMPRESS
 v.
 TUCKER.

1882

EMPRESS
v.
TUCKER.

preach sedition. If such was the effect of his simple preaching, the results to follow from the exciting demonstrations, such as the Salvationists intend to make, can easily be imagined. Major Tucker has cited the case of the Commissioner of Police at Calcutta v. the Missionaries of that city. I had read of the case at the time it occurred, and have read again carefully the report which Major Tucker was good enough to send to me. That case does not apply. There the missionaries were prohibited from preaching in an open square, while here the police actually says that the Salvationists can do so, but that they will not be allowed to parade in procession through the public streets for fear of the public tranquility being disturbed, Sir Frank Souter, the head of the police in this city, who is well known and esteemed for the tact, judgment and foresight with which he conducts the duties of the Prefect of the Police of this city, which comprises in its population people of various creeds, considered it prudent, from information which he must have derived from the best sources at his command, not to allow the procession of the Salvationists in the public streets, and his order ought unquestionably to have been obeyed. It was an order which he had issued in the interests of peace and the interests of all parties, the Salvationists included.

That there should be no misunderstanding on the part of any one section of the community as to the actions of magistrates in matters such as the present, I wish particularly to say that the duties of magistrates in such cases have been clearly explained by Mr. Mayne in his commentary on the Penal Code. I will read it here, so that all parties may know how far their acts would be tolerated on religious grounds. Mr. Mayne says: "A very important question may arise as to whether a magistrate should invariably prohibit certain acts merely upon the ground that they may endanger public tranquillity. There may be cases in which religious or political bigotry will render it certain that a disturbance will ensue upon the exercise of certain rights, and yet it may be the duty of the magistrate to support the parties who claim that exercise in the face of all opposition. For instance, the establishment of a Christian place of worship in a Brahmin village, and the attendance of native converts at divine worship, might be certain to produce a breach of the peace, and yet it would, I conceive, be the duty of the magistrate to call out an armed force, if necessary, rather than to allow unoffending persons to be intimidated out of their lawful privileges. I imagine the true rule to be that where the exercise of a right is a mere luxury, the temporary denial of which would not practically interfere with a man's general rights as a subject, he may fairly be forbidden to enforce his rights at the risk of public disturbance. But when the right is one of a substantial nature which enters into the daily usages of life, then the magistrate is bound to support the subject against illegal opposition. Tranquillity ought not to be maintained by a sacrifice of liberty. I conceive the magistrate ought, at all hazards, to support every sect in their practice of their religious rights in such places as are set apart for them. This is a substantial right, but if they wish to parade about the streets with the symbols of their faith, this is a mere luxury, and may fitly be refused if it is likely to be attended with a disturbance." These are the lines upon which it is rightly the duty of the magistrates to act, and no section of the community can have any just cause of complaint. I now say that I convict

the accused of the first and the second offence with which they are charged; it is not necessary to notice the third charge. For the offence of which the accused are convicted the law empowers me to award imprisonment up to, six months and to inflict a fine to the extent of rupees one thousand, but in dealing out the punishment it is my duty to bear in mind the circumstances of the case. I believe the accused are actuated with good intentions; but as Mr. Cleveland, who has put the case before the Court most fairly and temperately, has observed, the question of their intention is out of consideration in view of the possibility of a disturbance. I presume that the object of the prosecution in this case is not that the parties concerned should be heavily punished, but that the law should be clearly laid out and vindicated. I think, therefore, that under all the circumstances of the case the ends of justice will be satisfied by fining the first accused, Major Tucker, in the sum of Rs. 50 and the two other accused, Lieutenant Norman and Lieutenant (Miss) Thompson, Rs. 25 each. The accused must know that a repetition of the offence will render them liable to the full penalties prescribed by the sections under which they are convicted.

1882

 EMPRESS
v.
TUCKER.

The accused applied to the High Court under section 147 of the High Court's Criminal Procedure Act X of 1875.

Inverarity for the applicants.

Hon. B. Lang (Acting Advocate General) for the Crown.

Inverarity.—I contend there was no assembly as is required by section 151. The evidence, if sent for, would show that the three accused were walking along the streets singing, and that fifty or sixty people followed them. An assembly means a company of persons met together on one spot. They may not be quite stationary, but it is clear that an assembly does not include persons who were walking along the streets. If it did, it would be absolutely impossible to leave an assembly supposing that they were commanded to disperse and they all chose to take the same direction. The definition of an assembly in Webster's Dictionary is "a company of persons gathered together in one place for some common purpose". Then, *secondly*, there is no evidence whatever that the accused continued in an assembly of five or more persons after they had been lawfully commanded to disperse, for the evidence would show that the people who were following the three accused did disperse when the Deputy Commissioner, Mr. Smith, and the Superintendent, Mr. Brewin, gave the order to disperse. What the accused refused to do, was to leave off singing and walking. To constitute the offence a person must continue in the assembly

1882

EMPRESS
v.
TUCKER.

of five or more persons, and if the fifth and the rest went away and only four stopped behind and refused to obey the orders, they would not commit the offence under section 151. *Thirdly*, I contend that there was no lawful command to the assembly to disperse. Section 480 of the Code of Criminal Procedure, which forms part of chapter XXXVI which has been applied to the High Court by section 43 of Act XI of 1874, says: "Any Magistrate or officer in charge of a police station may command any unlawful assembly or any assembly of five or more persons, likely to cause the disturbance of the public peace, to disperse." It has not been proved that Mr. Smith or Mr. Brewin was such an officer, and it is not pretended that any Magistrate gave the orders. [KEMBALL, J., referred to section 137.] This section has not been extended to the Bombay High Court. The Legislature has applied some sections of the Code to Bombay and not others. *Lastly*, on this point I submit that there is no legal evidence to show that there was a likelihood of a disturbance of the public peace. The evidence, which has been admitted and relied on, consists of the opinions of policemen and the reasons which they say led them to form those opinions. Admitting the opinions of policemen in cases which they prosecute, is to make them judges in their own cases.

In regard to the conviction under section 188 of the Indian Penal Code, two orders are alleged to have been given to the accused besides the order not to sing—the order to take down the banner, and an order from Sir Frank Souter, Commissioner of Police, not to march in procession at all. This latter order the Commissioner had no power to issue, assuming without admitting that such an order was issued. Section 77 of the Bombay City Police Act XIII of 1856 empowers the Commissioner from time to time under the orders of the local Government to make rules to regulate processions when started, but not to forbid them altogether. Mr. Tucker was told he could not proceed at all. The power to regulate did not include the power to prohibit: *Calder Navigation Company v. Pilling*(1).

The Advocate General for the Crown was not called on.

(1) 14 M. & W. 76.

KEMBALL, J.—This is an application for our interference under the special powers given us by section 147 of the High Court's Criminal Procedure Code (X of 1875), no appeal being allowed by law : see sections 167 and 180 of the Presidency Magistrates Act (IV of 1877). The accused appear to have been convicted under two sections of the Penal Code (sections 151 and 188), apparently, therefore, of two separate offences, the gist of each, however, being the same, *viz.*, disobedience of lawful commands, though but one sentence has been passed, and that of almost a nominal character—a fine of Rs. 50 being inflicted in the case of Mr. Tucker and Rs. 25 upon the other two,—and the only question which we have to consider is whether a sufficient case has been made out on the merits to induce us to suppose that there has been a failure of justice. With reference to the charge under section 151 of the Indian Penal Code it has been argued that there was no assembly, there being merely the three accused followed, as the Magistrate said and as apparently generally agreed, by about fifty or sixty persons : and for the meaning of the word assembly we have been referred to Webster's Dictionary, it being suggested that if persons are walking along, with others following, and not standing for any length of time, that cannot be regarded as an assembly. Taking, however, a common-sense view of the matter, it seems perfectly clear that the action of these accused was calculated to draw a crowd,—in fact, their very object was to cause persons to assemble, and, therefore, the accused and those who joined them, whether stationary or moving, constituted an assembly of five or more persons.

Next, it has been said that it is not true that the accused refused to disperse when the other members of the assembly were ordered to and did disperse. But looking at the Magistrate's judgment there is clear evidence that, before dispersing the rest of the assembly, Mr. Brewin and Mr. Smith went to Mr. Tucker and his two companions and asked them to disperse, and that they distinctly refused to do so, and there is nothing in the affidavit before us which suggests that this statement of the evidence is incorrect. That being so, it is clear to us that the accused persons were, within the meaning of the section under consideration, knowingly continuing in an assembly after such assembly had been commanded

1882

EMPRESS
v.
TUCKER.

1882

 EMPRESS
 v.
 TUCKER.

to disperse. But it is argued that the police officers above named had no authority whatever to command the assembly to disperse and that there was no likelihood that a disturbance of the public peace would ensue. There is no definition of the term "officer in charge of a police station," but we may assume that there are police stations in Bombay with officers in charge of them, and we think that in dealing with chap. XXXVI of the Criminal Procedure Code of 1872, which has been made applicable to the town of Bombay, we may take into consideration section 137 of the same Code, so that even assuming that Mr. Brewin was not an officer in charge of a police station—a question which was apparently not disputed before the Magistrate—we must hold that Mr. Smith, the Deputy Commissioner of Police—an officer of police undeniably superior in rank to officers in charge of police stations—had the authority contemplated in section 480 of the said Criminal Procedure Code.

The remaining question raised is whether the assembly was likely to cause a disturbance of the public peace? We have been told that the opinions of any persons on this point is not evidence, and should not have been admitted; but whether a disturbance of the peace is likely to be caused, must of necessity be very much a matter of opinion, and the police officer, to whose discretion the law leaves the duty of dispersing assemblies, must of course act upon his own opinion, one way or the other; and if his opinion is relevant, the grounds on which it is based are relevant also. In cases of this kind the opinions of policemen who know the people of Bombay is obviously valuable, and the Magistrate himself must look to the surrounding circumstances and form his own conclusions, whether the acts committed were reasonably likely to lead to a breach of the peace. Knowing, as we do, the different classes who live in Bombay, their feelings and the inflammable material of which the population is made up, and knowing the views of the so-called Salvationists who style themselves an army whose avowed purpose is, as it were, to force their views upon others, it appears to us that most people of common sense would come to the conclusion that an assembly, such as that we are considering, in the public streets would probably lead to a disturbance. In this view we see no reason whatever for thinking that there has been any error of law with

reference to the charge under section 151 of the Indian Penal Code. As regards the charge under section 188 of the Indian Penal Code, which is said to relate to the disobedience, by the accused, of the order of the Police Commissioner forbidding them to go out in procession, there is no doubt a great deal in Mr. Inverarity's argument upon section 77 of the Police Act XIII of 1856, but we think it is unnecessary, under the circumstances, to consider whether this portion of the conviction was sustainable, or to decide whether the Police Commissioner was justified, under the said provision, in prohibiting the intended procession. An appeal is expressly prohibited by law, and in our view of the conviction under section 151 of the Indian Penal Code we do not think our interference is required in order to promote the ends of justice. The application, therefore, stands rejected.

Attorneys for the applicants.—Messrs. *Jefferson, Bhaishankar and Dinsha.*

Attorney for the prosecution.—Mr. *H. Cleveland*, Government Solicitor.

1882

 EMPRESS
 v.
 TUCKER.

 ORIGINAL CIVIL.

Before Mr. Justice Latham.

HASONBHOY VISRAM AND OTHERS *v.* H. CLAPHAM, OWNER; J. HENDERSON, MASTER OF STEAM-SHIP *HUTTON*, AND MESSRS. FINLAY, MUIR & Co.*

1882
 August 18, 21,
 22, 24, 25,
 & September 5.

Charter-party—Principal and agent—Charter-party signed by agents for master and owner—Parties to suit—Liability of master—Liability of agents—Master of ship, the agent of charterer to sign bill of lading—Right of master to recover from charterer sums paid by master as damages for short delivery of cargo—Appropriation of payments—Contract Act (IX of 1872), Secs. 69, 60, 69, 230, 235.

By a charter-party, dated 20th September, 1880, F., M. & Co., as agents for master and owner, let the steam-ship *Hutton* to E., for a term of not less than three and not more than four months, for the sum of Rs. 15,000 per month payable in advance. By subsequent agreement the term was extended to 30th March, 1881, and the charterer was to pay at the rate of Rs. 18,000 a month for the extended time. On 27th February, 1881, the ship being about to proceed on her last voyage to Calcutta and thence to Bombay, E., finding himself unable to pay more than Rs. 6,000 out of the sum of Rs. 18,000, which was then due as hire for the month ending 9th March, 1881, requested the plaintiff to pay F., M. & Co. on his behalf