

**(1872) 07 CAL CK 0007**

**Calcutta High Court**

**Case No:** Miscellaneous Criminal Case, No. 162 of 1872

In re: Shistidhur Parui  
and Others

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** July 2, 1872

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### **Judgement**

Glover, J.

I have felt some difficulty about this case, but after consideration, I think that the petitioners should succeed, and the order of the Courts below be set aside. I do not think it necessary to go into the question as to how far the release of the "Bhowur" or lake by the Collector settled the rights of the complainant, Indrobusan Chuckerbutty, as the action of the defendants (petitioners Before us) does not seem to bring them within the purview of s. 441 of the Penal Code. To convict under this section, it must be shown that the defendants entered upon property in the possession of another, with "intent to commit an offence," and I think that in this case the element of "Intention" is wanting.

2. The defendants asserted, and had all along asserted, a prescriptive right to fish in the Bhowur without payment of rent, and the zemindar had already failed in a suit brought under Act X of 1869 to get rent from them, not having been able to prove that they were his tenants, or had ever paid rent to him. It may therefore be reasonably concluded that the defendants thought that they had vindicated their claims, and had a right to fish, as they had done heretofore. It cannot, I think, be presumed that they continued to fish with any intent to "commit an offence;" they considered themselves possessed of a right, to which the decision in the Act X suit had given some color, and determined to exercise it. They seem to have acted bona fide, and not to have exceeded their supposed privileges.

3. The zemindar's notice, warning them not to fish, did not change the state of things so far as s. 441 is concerned; and after what has occurred between the parties, no conviction for criminal trespass can possibly be had. The zemindar must establish his rights by a suit in the Civil Court to eject the defendants, or sue to have the defendants declared liable to pay him rent for the future.

Kemp, J.

I quite concur in this view of the case. In the definition of criminal trespass, the entry and the intention with which a party enters are the essentials. In this case it appears to me clear that the petitioners have exercised a supposed right in a bona fide manner. They have all along asserted their right to fish in the lake free of payment of rent, and the attempt of the opposite party to establish the relationship of landlord and tenant has signally failed. It was found that the jumma-wasil-bakis filed by the zemindar to establish tenancy and payment of rent were false. It is for the zemindar to take steps to establish his right to receive rent from the petitioners, or (if he treats them as trespassers, which he has hitherto not done) to eject them.