

**Harikisan Balabakash Vs. the State**

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**SooperKanoon Citation :** [sooperkanoon.com/341069](http://sooperkanoon.com/341069)

**Court :** Mumbai

**Decided On :** Jun-06-1950

**Reported in :** 1951CriLJ71

**Judge :** Mudholkar, J.

**Appellant :** Harikisan Balabakash

**Respondent :** The State

**Judgement :**

ORDER

**Mudholkar, J.**

1. This is an application for revision of an order of the Sessions Judge Akola affirming the conviction of the applicant under Section 379, Penal Code and sentencing him to a fine of Rs. 75.

2. It is common ground that the applicant had sold three bags of jaggery powder to Premraj p. w. I. at the rate of Rs. 18-4-0 per maund. According to the prosecution, after the bags were purchased by Premraj they were taken for weighing to a dharmkanta. After weighing they were taken to Premraj's shop in a cart. Thereafter, Premraj went to the shop of the applicant to make payment to the applicant. As the applicant was not there he paid a sum of Rs. 134-4-6 to the applicant's son, believing that that was the price to be paid. The applicant's son

thereupon passed a receipt in his favour for this amount. According to the prosecution the applicant said that he was entitled to a sum of Rs. 9 2-0 more on the basis of the weight noted on the slip issued to him after the weighment of the бага on the dharamkanta. Premraj refused to pay this sum to the applicant, whereupon the latter is said to have removed all the three бага from Premraj's shop to his own.

3. The applicant denies that the бага were taken to the shop of Premtaj after they were weighed on the dharamkanta. According to him, they were brought to his own shop. Further, according to him Premraj paid Rs. 124-1-6 to his son and promised to bring a cart to his shop for taking them away while in the meanwhile he, i.e. the applicant, returned to the shop and found that he was entitled to be. 9-2-0 more than what Premraj had paid. So when Premraj arrived at the shop with a cart he asked him to pay up the balance, and refused to let him remove the бага unless he made that payment. Further according to the applicant Premraj promised to pay up the balance, but instead of paying it he lodged a false complaint against the applicant at the instance of one Ranglal who is his rival in business.

4. Both the Courts below have held that the bags were taken to the shop of Premraj after weighment and that the applicant removed them to his own shop from the shop of Premraj against the will of the latter. These findings are challenged before me. I, however, see no reason to take a different view of the evidence bearing on the point particularly in view of the admission of Nawalohand (D. w. 2) to the effect that the applicant himself told him that he had sold and delivered three bags of jaggery powder to Premraj.

5. It is then argued that the only object with which the applicant removed the бага from the shop of Premraj to his Bhop was to compel Premraj to pay up the balance and that the applicant had no dishonest intention. In support of this contention reliance is placed on the following 4 cases : Hamid Ali v. Emperor 53 Cal. 1015 : A.I.R 1926 Cal. 149 : 27 Or. L.J. 80 Sitabai v. Emperor A.I.R 1930 Bom. 488 : 82 Or. L. 3. 287 Muhammad Abdul Khover v. Asgar Khan 148 I. c. 892 : 35 Or. L.J. 761 Cal. and Jay Mahio v. Emperor A.I.R 1941 Pat. 883 : 42 Or. L.J. 293. In the

Court below, reliance was placed on behalf of the applicant on the decision in *Arfan AU v. Emperor* 44 Cal 66 : A.I.R 1917 Cal. 648 : 17 Cri. D. j. 456. On the other hand, the Court below has relied upon the decisions in *Empress V. Dongria Gaoli* 13 O. P. L. R. Or. 167, *Queen. Empress v. Sri Ghurun Chungo* 22 Cal, 1017 (f.b.) *Emperor v. Naushe Ah Khan* 34 all 89: 12 or. L.J. 580 and *H. J. Bansom v. Triloki Nath* 17 Luck. 663 : A. I. R 1942 Oudh 818: 43 Or. L.J. 578.

6. In *Hamid Ali v. Emperor* 52 Oal. 1015 : A.I.R 1926 Cal. 149 : 27 Or. L.J. 80 it has been held that it is not theft if a person acting under a mistaken notion of law, and believing that certain property is his, and also that he has a right to take the game until payment of the balance of some money due to him from the vendor, removes such property from the possession of the vendee.

7. A similar view has been taken in *Sitabai v. Emperor* : 32 Cri. L.J. 287. In the third case i.e. *Muham-mad Abdul Khoover v. Asgar Khan* 148 I. O. 892 : 85 Cr. L.J. 761 an agreement of hire-purchase per A.I.R 1930 Bom. 488 mitted the employees of a company to take away the parts of a machine supplied by them if the instalments were not paid. Acting on a bona fide impression that the instalments had not been paid they removed the parts and it was held that the removal did not constitute an offence of theft.

8. In *Jay Mahto v. Emperor* A.I.R 1941 Fat. 383 : 42 Cri. L. 3. 293 where a person whose buffalo was injured by that of another person took the latter's buffalo believing under mistake of fact and in ignorance of law that he had had a right to take it without committing an offence and to retain it until compensated it was held that no offence was committed inasmuch as there was no dishonest intention on the part of the person taking away the buffalo.

9. In *Arfan Ali v. Emperor* 2 oal. 66 : A.I.R 1917 Cal. 648: 17 Cri. L.J. 456 it was held that the removal of property in the assertion of a bona fide claim of right, though unfounded in law and fact does not constitute theft, but that a mere colourable pretence to obtain or keep possession of property does not avail as a defence. It was further held that whether the claim is bona fide or not must be determined upon all the circumstances of the case and that a Court ought not to convict unless it holds that the claim is a mere pretence.

10. None of these oases really assists the applicant because he did not come forward with the defence that whatever he did was in the assertion of a bona fide right. On the other hand, he completely denied that he had removed the bags from the shop of Premraj to his own. The importance of the plea taken by an accused person in a case of this type is emphasized in the last mentioned case. There, the learned Judges have quoted with approval at p. 70 the following from Sir Matthew Hale in his Pleas of the Crown vol. 1. pp. 508, 509:

It is the mind that makes the taking of another's goods to be a felony of a bare trespass only, but because the intention and mind are secret the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case. If A, thinking he hath a title to the horse of B. seizeth it as his own, or supposing that B holds, of him, distrains the horse of B without cause this regularly makes it no felony, but a trespass, because there is a pretence of title; but yet this may be but a trick to colour a felony and the ordinary discovery of a felonious intent is if the party doth it secretly, or being charged with the goods denies it.

11. The position then is that the applicant did take away the three bags from the shop of Premraj to his own shop in order to compel him to pay up the balance of Rs. 9-2-0. The question is whether this amounts to an offence, because obviously it was not the intention of the applicant to deprive Premraj of those bags for all time. This aspect of the matter has been dealt with very fully in the Full Bench decision in Queen-Empress v. Sri Churn Ghungo 22 Cal. 1017. The learned Judges have there held that a creditor by taking any movable property of his debtor from the debtor's possession without his consent with the intention of compelling him to pay his debt commits the offence of theft as defined in Section 878, Penal Code, even though it was not his intention to deprive the other person of his property permanently. Dealing with the question of the intention of the accused person in taking away the property Pigot J., with whom two learned Judges concurred, has observed as follows at p. 1022:

We think that an intention on the part of Urn accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of Section 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of: his alleged debtor, and would tend to a state of thing: in which every man might, if strong enough, take the law into his own hands.

12. I am in respectful agreement with these observations. This decision was followed in *Emperor v. Naushe Ali Khan* 84 All 89: 13 Cri. L.J. 560 and also in *H. J. Ransom v. Triloki Nath* 11 Luck. 663: A. I. R 1942 Oud. 318: 43 Cri. L.J. 678 on which the Court below has placed reliance. The C. F. case to which the learned Sessions Judge has made reference appears to have been cited by mistake, as it deals with an entirely different point.

13. The position then is that where a person acts in the bona fide belief that he has a right to take away a thing and asserts such a right immediately after he is charged with theft no offence is committed. If on the other hand. he takes away a thing, not because he bona fide believes that he has a right to take away the thing but with the intention of coercing the person in possession to do something, even though he does not intend to deprive that person of the thing permanently, he must be deemed to have committed an offence of theft. This is what in substance the different cases referred to by me lay down.

14. It follows, then, from this that the applicant's act amounts to an offence. Accordingly I uphold the conviction and sentence passed on him and dismiss the application.