

Pargan Chandra Vs. State of U.P.

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Court : Allahabad

Decided On : Nov-22-1976

Reported in : 1977CriLJ903

Judge : K.C. Agrawal, J.

Appellant : Pargan Chandra

Respondent : State of U.P.

Judgement :

ORDER

K.C. Agrawal, J.

1. This revision is directed against the judgment of the Third Additional Civil and Sessions Judge, Allahabad dated 30th October, 1972 convicting the applicant under Section 447 of the Indian Penal Code and sentencing him to a fine of Rs. 50/-. In default of payment of the fine he has been ordered to undergo rigorous imprisonment for one month. The Magistrate had further ordered the applicant to remove the encroachment within 5 days of the order failing to do so he was liable to a fine of Rs. 10/-per clay.

2. The case of the prosecution briefly stated is that the applicant had constructed a house at Kilometer No. 217 of the provincial G.T. East. A report was made in the police station and the applicant was asked to desist from doing so but he did not

pay any heed to the request. Hence he was served with a notice. The applicant still persisted with the construction. Thereafter a complaint was filed by the Assistant Engineer, P.W. D. against the applicant under Section 447, I.P.C.

3. The applicant denied that the house constructed on the site in question belonged to him. He asserted that the house belonged to his wife Shrimati Bhagwati Devi, He also alleged that no encroachment upon the road had been made and, therefore, the complaint filed was liable to be rejected.

4. The prosecution produced Mohammad Hamid, (P.W. 1) the Survey Amin of the Public Works Department who had made measurements and had prepared a survey map Ex. Ka. 1 showing that the house lies within the boundary of the Public Works Department, Ram Dular (P.W. 2) the works Agent of the Public Works Department stated that the construction made by the applicant was on the land belonging to the P.W. D, After examining the evidence of the prosecution as well as that which was produced by the defence the Magistrate found that the applicant had encroached upon the road and, therefore, convicted and sentenced him as aforesaid. The appeal filed by the applicant was dismissed and hence the present revision.

5. The learned Counsel for the applicant urged that the conviction of the applicant was unjustified in law inasmuch as there was no reliable evidence on the record of the present case on the basis of which the encroachment alleged by the prosecution was established. The submission made by the learned Counsel for the applicant had no merits. As stated above, the prosecution had not only given oral evidence establishing that the construction was made by the applicant on the road belonging to the Public Works Department but also produced the Survey map. Measurements given in the Survey Map demonstrated and established that the house of the applicant lay within the road boundary of the Provincial G.T. Road. According to the measurements of Mohd. Hamid (P.W. 1) the house was made at a distance of 22 feet 2' from the centre of the road and the road at that place was 56 feet wide. This clearly shows the encroachment of the road by the applicant. The witnesses produced by the prosecution were independent and thus it is not possible to accept that the material on record did not satisfactorily establish that

the land on which the applicant raised constructions belong to the Government.

6. The second submission advanced on behalf of the applicant was that the conviction of the applicant cannot be sustained inasmuch as there is no material on the record from which the inference could be drawn that the applicant made the construction with the intention of taking unauthorised possession of Government land or making unauthorised use of it. In order to consider the argument advanced by the learned Counsel for the applicant it may be relevant to quote the relevant part of Section 441 of the Indian Penal Code as amended by the Criminal Laws (U.P. Amendment) Act, 1961, which reads as follows:

Criminal Trespass : Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or With intent to commit an offence, or having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property or its possession or use, when called upon to do so by that another person by notice in writing, duly served upon him, before the date specified in the notice, is said to commit criminal trespass.

In support of the submission that there must be direct evidence on the record from which inference could be drawn that when the applicant made the construction he did so with the intention of taking unauthorised possession, The learned Counsel for the applicant referred to an unreported decision of this Court given in *Algoo v. State of U.P.* (Criminal Revn. No. 1729 of 1967, decided on 14-7-1970 (All)) and also to another decision of this Court given in *Motilal v. State of U.P.* (Criminal Revn. No. 532 of 1972 decided on 13-2-1975 (All)). It is no doubt true that in order to apply the amended Section 441 to a case, it is necessary to find that the intention of the person making the construction was to take unauthorised possession of the Government land for making unauthorised use of it. But this is not a fact which must necessarily be established by bringing direct evidence on

the record. A conclusion is possible to be arrived at with respect to the intention required to be established for proving the requirement of Section 441, I.P.C. from the circumstantial evidence. The circumstantial evidence has been defined as a fact from which the judge may infer the existence of a fact in issue. It is true that the evidentiary fact usually has to be proved by testimony, but it may not be possible in every case to bring oral evidence to establish a particular fact. In that event the circumstantial evidence becomes relevant. Circumstantial evidence is usually contrasted with direct evidence. In fact, as observed by Lord Hardwick in *Omychund v. Barker* (1745) 1 Atk 21 at 49, the best evidence rule is that 'the Judge and the sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow,' As observed by Wills in his book 'Circumstantial Evidence' 6th Edition page 6, circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, but by the weighing upon that fact or other and subsidiary facts which are relied upon are inconsistent with any result other than truth of the principal fact. Examining the facts of the instant case it would be found that the conclusion derived by the courts below from the circumstantial evidence cannot be held to be illegal. The road upon which the encroachment was made was a public road and was being maintained by the Government. It establishes that possession of the land was taken by the applicant with an intention of taking unauthorised possession of the Government's road, This insistence to continue in possession even after service of the notice by the State Government to vacate premises, is incompatible with the innocence of the applicant and incapable of any explanation. In view of the above the finding of the courts below holding the applicant to be guilty of offence under Section 441, I.P.C. is correct.

7. *Algoo's case* (Cri. Revn. No. 1729 of 1967, D/- 14-7-70 (All)) (supra) relied upon by the learned Counsel for the applicant is clearly distinguishable inasmuch as in that case the applicant was under the impression that the land belonged to the Town Area and he even obtained the permission from the Town Area to make the constructions. On these facts the view taken was that it could not be said that *Algoo* had committed criminal trespass as defined by Section 441 of the Indian Penal Code. *Motilal's case* (Cri Revn. No, 332 of 1972, D/- 13-2-1975 (All)) (supra) relied upon by the learned Counsel has, however, only followed the decision given

in Algoo's case. Accordingly, in my opinion, none of the two cases relied upon are of any assistance to the applicant.

8. Coming now to the last question, the argument of the learned Counsel for the applicant was that the Magistrate was not justified in directing the applicant to demolish the constructions and to remove the encroachment made by him. The submission made by the learned Counsel for the applicant appeals to be well founded. This direction was, however, attempted to be justified by the learned Counsel appearing for the State by taking recourse to Section 522, Criminal P.C. It appears that in order to apply this section it is necessary that the person has been convicted of an offence attended by criminal force Or show of force or by criminal intimidation. The object of Section 522, Criminal P.C. appears to be to prevent any person from taking wrongful possession of immovable property by his unlawful and forcible act and to enable the criminal court by a summary order to restore state of things which existed at the time of the dispossession by the convicted person. Where there is no finding and nothing on the record to show that a person has been dispossessed of the property by use of force this section would not apply. In the instant case, neither there is any finding nor evidence on the record to show that any criminal force was exercised by the applicant in making constructions. Accordingly, the applicant having not used criminal force in obtaining or retaining possession could not be directed under Section 522, Criminal P.C. to demolish the constructions.

9. In the result, the revision succeeds and is partly allowed. While maintaining the conviction and sentence of the applicant under Section 447, I.P.C. I set aside the direction of the Magistrate to remove the constructions.