

Satish Chandra Vs. the King

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Court : Kolkata

Decided On : Jul-29-1948

Reported in : 1949CriLJ161

Judge : Sen, J.

Appellant : Satish Chandra

Respondent : The King

Judgement :

ORDER

Sen, J.

1. The petitioner has been convicted by the Additional Presidency Magistrate, Calcutta, of having committed house trespass, an offence punishable under Section 448, Penal Code and sentenced to pay a fine of Bs. 50 in default to under, go rigorous imprisonment for one month.

2. The case for the prosecution is as follows: The complainant is a tenant under the accused with respect to certain premises, 87 Pataldanga Street. He left the premises temporarily after the communal disturbances of August 1946. He came back after some months, but further disturbances taking place in May 1947, he again -shifted his residence to another place but continued to use the aforesaid premises as an office. On 2nd October 1947 the accused broke open the lock and

took possession of the premises. It is not the case for the prosecution that at the time of the alleged unlawful entry of the accused any one was there or that any one protested. Evidence was given on behalf of the prosecution to show that the accused had already taken proceedings in the sent Controller's Court and other Courts for the rejectment of the complain, ant and that these proceedings were pending and it was argued that in spite of the pendency of these proceedings he took forcible possession of the premises without terminating the tenancy. This in short is the case for the prosecution.

3. The case made out in the petition of com. plaint that the premises were used as the office of the complainant till the time of dispossession has been disproved by the prosecution witnesses themselves. Prosecution witness 2 Chandra Kanta Sen and prosecution witness 5 Birendra Nath Naekar gave evidence to the effect that the house was lying deserted and vacant on and October 1947. The complainant's own son says in cross-examination that they left the house on 1st September and there was no one in occupation of the house since then. It is quite clear therefore that at the time of the alleged trespass the house was deserted and unoccupied.

4. The point for determination is whether in these circumstances the petitioner can be found guilty of house trespass. In order to determine this point, it would be best to refer to the relevant sections of the Penal Code. Criminal trespass is denned in Section 441 of the said Code. In order to constitute this offence, the accused must enter into property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. It is clear from the wording of the section that there can be no criminal trespass unless the 'intent' specified in the section is present. The phrase 'any person in possession of such property' is also to be remembered. The intent to annoy and intimidate must be not with respect to any and every person connected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by the section. Now, house trespass is denned in Section 442, Penal Code which says that whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property is said to commit house trespass. It is quite clear from this

section that the mere trespassing into the house of another does not constitute house trespass within the meaning of Section 442, Penal Code. The criminal intention and other ingredients specified in Section 441 of the said Code defining criminal trespass must be present in order to constitute the offence of house trespass. In short house trespass means criminal trespass in respect of a house. These are the sections which need be referred to. The question is whether in view of the provisions of these sections it can be said that the petitioner committed house trespass. Taking all the allegations of the prosecution to be true it may be said that the petitioner took unlawful possession of the property. The mere taking of unlawful possession will not amount to either criminal trespass or house trespass. There is no evidence that the petitioner intended to commit any offence. An unlawful act is not necessarily an offence. The penal law deals with offences and an unlawful act which does not amount to an offence is a matter which has to be investigated by a Civil Court.

5. Next, there is no evidence to show that the petitioner had any intent to annoy or intimidate anybody. It may be that his conduct would result in annoyance, but the words used in the section are 'intent to annoy etc.' Had the words been 'with the knowledge that his act annoyed etc.', the position would have been different. Intent is something different from mere knowledge. This distinction has not often been borne in mind; but throughout the Code a distinction is made between intention and knowledge. Further, as the house was deserted it can not be said that he intended to annoy a person in possession of the house. There was really no one in possession. The learned Magistrate has entirely misconceived the law. He makes the following observation:

Of course some of the P. Ws. have said that the house was vacant or deserted but that does not matter. Admittedly the complainant had taken possession only on 2Dd October 1947, and that with police help, They were not in possession before that. Otherwise why they should take the help of Court? Thus the complainant had been in possession of the house on the day of occurrence.

As I have pointed out above mere constructive possession is not sufficient. Then the learned Magistrate says:

But the charge clearly states that the accused intended to dispossess the complainant from his lawful possession. This was certainly for causing annoyance to the complainant.

If this proposition of law were correct, then every act of civil trespass would amount to a criminal offence. That is certainly not the law. There is a decision of the Bombay High Court, *Emperor v. Lakshman Baghunath*, 26 Bom. 558 : 4 Bom. L. E. 280) which says that intention to annoy is not identical with with or desire to annoy and that if annoyance is the natural consequence of the act and if it is known to the person who does the act that such is the natural consequence, then there is an intent to annoy. I respectfully disagree from this view. It is contrary to the view taken by the other High Court. In this connection I would refer to the case of *S. Vullappa d Ors. v. S. Bhima Bow*, 41 Mad. 156 : A.I.R. (6) 1918 Mad. 186: 19 cr. L. J. 162 (F.B.)) where it was said that trespass is an offence under Section 441, Penal Code only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under Section 448, Penal Code. This was the decision of the Full Bench,, and their Lordships pointed out the distinction between intent and knowledge. In this connection I would draw the learned Magistrate's attention to the observations of the learned Chief Justice at p. 162 of the said report. The view I have taken finds full support from this decision. The Allahabad High Court in the case of *Emperor v. Chhote Lai*, 40 all. 221 : A.I.R. (6) 1919 ALL. 249: 20 Or. L. J. 119) took the same view. There a person was found in the house of another in the circumstances which would prima facie indicate that the offence of criminal trespass had been committed and set up the defence that he did not enter the house with any of the intents referred to in the section, but in pursuance of an intrigue with a female living there; the Court observed that in such circumstances it was the duty of the trying Court to give the accused an opportunity of substantiating such defence and that if the accused succeeded in showing that his presence in the house was in consequence of an invitation by a female living in the house with whom he was carrying on an intrigue, then he cannot be convicted of criminal trespass. His Lordship went on to remark that if it is shown that the person in possession of the house has expressly prohibited the accused from

coming to the house, an intent to annoy may be legitimately inferred; I also find support of the view which I have taken in the following case: In the matter of the petition of Chander Narain v. J. G. Farquharson, 4 Cal. 887. In the case of Emperor v. Jangi Singh, 26 ALL. 194 : 1903 A. W. N. 230) the Allahabad High Court took the same view. The case is almost on all fours with the present one, A zamindar took possession of certain property of his tenant alleging that the land had been abandoned. He was convicted of criminal trespass. Their Lordships made the following observations:

His intention possibly was to obtain possession contrary to law, but this of itself would not constitute criminal trespass. Proof of an intention to commit an offence or to intimidate, insult or annoy was necessary. There was no evidence of any such intention, or from which such an intention might be reasonably inferred.

A very recent decision of the Chief Justice of this Court in the case of Nizamuddin and Anr. v. Jinnat Hossain, (1948) 49 O. L. J. p. 120 r (A.I.R.. (85) 1948 Cal. so) establishes the same principle. The facts are distinguishable, but his Lordship the Chief Justice relied in coming to his decision upon the case of Emperor v. Jangi Singh, 26 ALL. 194 ; (1908 A. W. N. 280) already referred to and adopted the view therein taken-

6. I hold that the criminal intent specified in Section 441, Penal Code not having been established the charge of house trespass must fail. I accordingly set aside the order of conviction and sentence and acquit the accused. The fine, if paid, shall be refunded. The Rule is made absolute.

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