

Sunil Kumar Pal Vs. Sadan Chatterjee and ors.

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Court : Kolkata

Decided On : Nov-30-1950

Reported in : AIR1951Cal297

Judge : Roxburgh, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Section 441

Appeal No. : Criminal Revn. No. 640 of 1950

Appellant : Sunil Kumar Pal

Respondent : Sadan Chatterjee and ors.

Advocate for Def. : Heramba Chandra Guha and ;Narendra Nath Banerjee, Advs.

Advocate for Pet/Ap. : J.M. Banerjee and ;Gurudas Bhattacharjee, Advs.

Judgement :

ORDER

Roxburgh, J.

1. This is a rule against an order passed by the Police Magistrate of Sealdah, on 29-11-1949, dismissing the petitioner's complaint under Section 203, Criminal P. C.

2. The facts really are not disputed. The petitioner had brought a case against Sadhan Chatterjee and others under Section 448, Penal Code, for trespass into certain premises of which he is the landlord. The premises had been left by their Muhammadan tenants during the Calcutta riots of 1946 and they had been severely damaged. The landlord had caused them to be repaired and made arrangements to let them to another tenant when the accused were alleged to have made this forcible entry and trespass. That case ended in conviction. The matter came as far as this Court and the conviction was upheld. There was also an application by the landlord under Section 522, Criminal P. C., which eventually failed, apparently on the ground of limitation. There seems some reason to suppose that the failure really was due to rather careless work by the petitioner's lawyers.

3. The petitioner now by the present proceedings obviously wants to obtain something equivalent to the effect of the order under Section 522 of the Code; in other words, he wants to have the accused, who were still remaining on the premises, again convicted for trespass, because they have remained there with one of the intentions described in Section 441, Penal Code.

4. The trial Court has dismissed the complaint on the ground that the case is barred under Section 403, Criminal P. C. Strictly speaking this is not the real justification for the dismissal, because the complainant is not seeking to have the accused convicted again for the precise offence for which they were convicted in the previous proceedings. The complainant's contention in law is that the accused by remaining on the premises with what he alleges to be the necessary intent under Section 441 are committing a separate offence from that for which they have been previously convicted and are again liable to prosecution and conviction.

5. The difficulty that lies in the way of the prosecution is the wording of the second part of Section 441, Penal Code. That renders a person punishable who

'having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult,'

In the present case the previous conviction shows that the accused entered unlawfully. Therefore the basis of the present prosecution does not exist under part-two of Section 441, Penal Code.

6. My attention has been called to cases in which some attempt has been made to get round what is thought to be a difficulty in the section,--cases where it has been considered that the accused has certainly committed an offence which ought to be punishable and an attempt has been made to show that it is in fact punishable under the wording of the section. The first case mentioned is that of Emperor v. Bandhu Singh, 6 Pat. 794 : (A.I.R. (15) 1928 Pat. 124 : 29 Cr. L. J. 99). In that case certain accused had been convicted by the trial Court under Sections 143 and 452, Penal Code, it being held that they were members of a party called Sahis, who had taken possession of a certain kutcherry by force on the 10th July. Later, a peon of the trustees who had previously had possession of the kutcherry went to the place and was attacked on 27th July. It was the later occurrence which formed the subject-matter of the conviction. On appeal to the District Judge, he acquitted the accused as he held that the offence of house-trespass under Section 452 could not have been committed. On appeal by the Government, against the acquittal, Mullick Ag. C. J. after discussing the law in England with regard to forcible entry stated:

'In my opinion no less punishable is an unlawful entry followed by an unlawful continuance of occupation. It may be said that the intruder or trespasser pays the penalty once for all upon conviction for the act of entry and that he cannot be again punished for continuance of occupation. I think the answer to this is that each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by Section 441 a new offence under that section is committed and a new liability arises.'

7. With great respect I find it difficult to follow the reasoning of the learned Judge. If, of course, it can be said that a trespasser remaining unlawfully on the premises with the necessary intent is to be deemed to have made re-entry on the premises every time the owner of the premises comes along and is intimidated Or insulted,

then no question of interpretation of the second part of Section 441 arise, because then on this theory the ease becomes a straightforward one under the first part of Section 441. In other words, the reasoning of the learned Acting Chief Justice does not get over the difficulty of the wording of Section 441. All we have is his statement that in Ma opinion the section substantially reproduces the English law and he establishes this by expressing the view that the trespasser who remains with intent to insult having entered unlawfully is really a person entering unlawfully on the premises every time the landlord comes to ask him to depart.

8. In the case of *Baldewa v. Emperor* : AIR1933 All816 , Bajpai J. of the Allahabad High Court purported to follow the Patna case to some extent, although he explicitly stated that it was not necessary for him for the purpose of his case to go so far as the learned Judge went in the Patna case and to hold that each time the true owner re-entered on the land and the trespasser opposed him with the intention required by Section 441, a new offence under that section had been committed. He merely stated that his opinion was that the Patna case strengthened him in the view he himself was taking in the case before him. He concedes that a literal reading of Section 441 might lend some support to the argument that as the entry in the case before him had been unlawful, the second provision could not be invoked in aid by the prosecution, but he considered that a literal interpretation of the section would lead to anomalies and, therefore, was not to be followed. With great respect it does not seem to be a question whether a literal reading of the section is to be made or not. The plain meaning of the words of this section rules out the application of the second part to cases where the entry was unlawful. Obviously, Mullick Ag. C. J. in the Patna case felt this difficulty and tried to avoid it in the way I have indicated.

9. There are two aspects of the question, firstly, whether certain types of trespass ought to be punishable, and secondly whether in fact they had been made punishable by Section 441, et. seq. Penal Code. In the Allahabad case referred to the entry was unlawful but without any of the necessary intentions required under the definition in Section 441. The accused had encroached on some railway land more or less innocently. Subsequently, when 'measurement was made and it was demonstrated to him that he had made an encroachment he refused to move and

hence was prosecuted and convicted. Bajpai J. considered it would be anomalous if in the circumstances the accused was not liable to punishment. But with great respect the fact that the plain wording of the section does not justify a conviction and thus leads to an anomaly seems to be no reason for giving an interpretation to the words of the section which they cannot possibly bear.

10. In another Allahabad case, *Jamuna Das v. Emperor* : AIR1945 All26 , Mathur J. differed from the view expressed in the earlier case by Bajpai J. In the case considered by him there had been clearly an unlawful entry with the necessary intention under Section 441, Penal Code. The question he was considering was the application of Section 522, Criminal P. C., where it was alleged that force had been used by the trespasser not at the original entry but on a subsequent occasion. The learned Judge held that there was no subsequent trespass in the circumstances and an order under Section 522, Criminal P. C., could not be based on such an alleged criminal trespass.

11. There appear to be two types of cases which arise for consideration, one of the type of the case of *Baldewa v. Emperor* : AIR1933 All816 , of unlawful entry without the necessary intent followed by unlawful remaining with one of the intentions prescribed, and secondly a case like the present of unlawful entry with the necessary intent followed by unlawful remaining also with the necessary intent. In my opinion, neither type of case is covered by the plain words of Section 441 plainly interpreted. Whether they ought to be made punishable or not is a matter for the Legislature.

12. As regards the present type of cases, I can see some obvious difficulty in any attempt to treat the action of the trespasser in remaining on the premises as a continuing offence liable to successive prosecution and punishment. In the case of house trespass the accused is already liable to imprisonment for one year and certainly in suitable cases a Magistrate might well take into consideration on the question of the punishment to be awarded, the fact whether the accused still remained on the premises or had left. On the other hand, if it is to be laid down that mere remaining with the necessary intent constitutes a further offence then a trespasser who unlawfully enters with the necessary intent will be liable for

prosecution for the entry; he will be liable for remaining five minutes later and successively ad infinitum. This requires some care in drafting so as not to create further anomalies if any attempt is made to make subsequent remaining with the necessary intent after unlawful entry a punishable offence.

13. I am quite satisfied that on the wording of Section 441 as it now stands no prosecution could succeed against the accused in the present case: in respect of their remaining on the premises after the unlawful trespass committed by them at the original entry for which they had already been convicted.

14. The result is that the Rule is discharged.

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