Sm. Subhana vs State Through Hashmat Ali on 15 September, 1953

Equivalent citations: 1954CRILJ413

JUDGMENT

Chaturvedi, J.

1. Srimati Subhana has come up in revision against her conviction under Section 448, Penal Code by the Special Magistrate of Lucknow. She was sentenced to pay a fine of Rs. 20/- and in default she was directed to undergo rigorous imprisonment for one month. She went in appeal before the Assistant Sessions Judge, who maintained the order of the Magistrate. She has now come up in revision on the ground that her conviction under Section 448, I. P. C. was illegal.

2. The facts of the case lie within a narrow compass. Hashmat Ali complainant filed a salt for ejectment against Munna Lal, son of the applicant. The suit was decreed and ultimately the possession of the portion of the house was delivered to Hashmat Ali on 3-2-1950 by the Civil Court. Hashmat Ali then put his lock on that portion of the house. A few days later when Hash-mat Ali went to realise rent from some other tenant, he found the accused in possession of the house after breaking open the lock which had been put by the complainant. Hashmat Ali at first tried to secure the help of the police to put him in possession of the house again. Ultimately, he filed a complaint about six months after the occurrence,

3. The facts stated above have not been seriously disputed before us. Both the Courts below have found that the complainant had entered into actual possession of the premises in suit on 3-2-1950. They have further held that the lock which had been put on the house by the complainant had been broken open by the applicant who had taken forcible possession of the house after her son had been ejected earlier. The question is whether the applicant has been rightly convicted under Section 448, Penal Code. Two reasons have been advanced for showing that the act of the applicant in entering into the house does not amount to criminal trespass as defined in Section 441, Penal Code. Firstly, it is pointed out that when the entry was made into the house, it was in the absence of the complainant and consequently there could be no question of any annoyance to him when the illegal act was done. Secondly, it was urged that the complainant was not in actual physical possession to attract the provisions of Section 441. Both these reasons are without any substance.

4. The argument that the person against whom criminal trespass is committed should be actually present on the property at the time when the illegal act of taking forcible possession is committed by a person is rather startling. If a person in actual possession of a house or shop goes away temporarily leaving it locked and in his absence a third person, without any right, breaks open the lock and occupies the building, it would be absurd to hold that the trespasser was not guilty of

criminal trespass because of the temporary absence of the person in actual possession. The language of Section 441 does not warrant such an inference. It runs thus : (His Lordship quoted the provisions of the section and proceeded :)

5. It would be going against the very spirit of Section 441, if it were held that no criminal trespass would be committed against a person in peaceful possession merely because a trespasser manipulates his entry in such a way as to go to the property in possession of another at a. time when the person in peaceful possession has temporarily gone out. There is nothing in Section 441 to confine its operation only when the person in actual possession and the trespasser making the forcible entry are present physically on the property on which trespass is committed.

6. In the case of - 'Govind Prasad', reported in '2 All 465 (A)', Straight J., pointed out that in view of the 'unusually vague and elastic language' of Section 441, care should be taken to see that Its scope is not so widened as to include within its fold cases which would not be fit even for civil proceedings. The opposite extreme of limiting its scope to an extent as to render the very object of the section nugatory should also be equally avoided. In the words of Straight J. the scope of Section 441 should be confined within those bounds that common sense and sound reason dictate. To say that if the person in possession is absent trespass committed in his absence will not be criminal trespass, is something which does not appeal to common sense.

7. Next, it was contended on behalf of the applicant that, in order to attract Section 441, the entry must be with a view to 'annoy' the person in possession, and that, unless the person, in possession is physically present on the premises the question of annoyance will not arise. This argument is again based on a misconception of the whole Section 441 which lays down that the entry of the trespasser must be with intent 'to annoy'. It is the 'intent' of the trespasser which constitutes the entry criminal. In every case we have to find out what was the intention of the person committing the trespass. The presence or absence of the person in actual possession on the spot is immaterial. Even though the person against whom the offence is committed is absent, the intention of the offender to annoy may be there. And in the circumstances of each case we have to find out whether that intention to annoy existed or not in the mind of the person committing trespass.

That intention 'to annoy' may be there in spite of the fact that the person against whom that intention is held may not be actually present at the time of entry. If the criminal intention was present in the mind of the person, his entry will be sufficient to make the trespass criminal trespass within the meaning of Section 441. The essence of the offence is the intent in committing the offence and not the presence or absence of the person against whom that intent is held.

8. The other point taken up is that the possession contemplated in Section 441 should be actual physical possession, and not a formal or nominal possession. It is urged before us that the complainant was not in actual possession of the house to which the entry was made by the applicant. This contention also is without substance. The question whether the complainant was in possession of the premises in suit or not is a question of fact. Both the Courts below have held that the possession of the property was with the complainant at the time when the criminal trespass was committed. There is no legal flaw in this finding of fact. The applicant is the wife of Mehilal, and

mother of Munnalal. Mehilal had set up proprietary rights in the disputed house in the partition suit No. 65 of 1940 but it was negatived by the Civil Judge, and on an appeal to the Chief Court the finding of the Civil Judge was confirmed. After Mehilal had receded in the background, his son Munna Lal came forward. The complainant then brought a suit for ejectment against Munna Lal which was decreed. The decree was executed, and ultimately on 3-2-1950, the complainant was put in possession. Having secured possession of the house, the complainant put his lock on the door.

Now came the turn of Munna Lal's mother, that is the accused applicant. The lock was put by the complainant on 3-2-1950 and when he again came to the premises on 7-2-1950 he found to his utter surprise and annoyance, that Srimati had taken possession of the house after breaking open the lock. Possession delivered to the complainant in execution of the decree is sufficient to show that it was complainant who was in peaceful possession of the portion of the house which had been locked by him. Possession such as this was sufficient to attract the provisions of Section 441, Penal Code. The dominion which the plaintiff had acquired over the property with the help of the civil Court was invaded and usurped by the accused when she broke open the lock and clandestinely entered into the house which she knew had been closed and barred against her by the complainant. The act of the accused could not but be a source of great annoyance to the complainant who had, with great difficulty and at great expense, succeeded, in ejecting the son of the accused. The criminality of the act is so obvious that there cannot be two opinions that the act was done to annoy the complainant who was in actual possession of the premises in suit.

9. On behalf of the applicant, reliance has been placed upon a decision of this Court in - 'Abdul Salam v. Rex' reported in ILR (1950) All 163 (B)'. Facts of that case may be briefly stated. One Srimati Mehr Bano was the owner of a house which she had let to Abdul Hamid who with the consent of the landlady had sublet it to one Mahfooz. Both the tenant and his subtenant vacated the house. Possession of the house was taken on behalf of the lady by her manager by locking the house. In that case the accused had broken open the lock and entered into the house without any right. Mootham J. took the view that as Shrimati Mehr Bano was in constructive possession of the house, Section 441, I. P. C. did not apply. With great respect, we find it difficult to subscribe to that view. So long as the tenants were in occupation of the house, Mehr Bano was no doubt in constructive possession of the house through her tenants. But the moment the tenants left the house, and Mehr Bano's manager put a lock on the house, the actual possession was with Mehr Bano. The fact that Mehr Bano did not actually come to live in the house Will not matter. It was not necessary. The putting of a lock on the house was sufficient to show that she had full control of the house so as to attract the provisions of Section 441, Penal Code.

In deciding the above case Mootham J. relied upon the case of Motilal reported in - 'Motilal v. Emperor' AIR 1925 All 540 (C). If we may say so with great respect the facts in Motilal's case differed materially with the facts of the case of Abdul Salam. In the Division Bench case of Motilal, one widow was the owner of a shop which had been let out to a tenant named Yusuf. When the widow died, there were two claimants namely Kanhaiyalal, who claimed the shop as the next reversioner, and Motilal who claimed to be the adopted son of the widow. The shop was in occupation of a tenant and Kanhaiyalal was successful in persuading the tenant to pay rent to him. The tenant decided to vacate the shop and did so on 24-10-1924. Motilal won the race by locking the

shop before Kanhaiya Lal could take its possession. The other claimant Kanhaiyalal then filed the complaint alleging that he was realizing the rent from the outgoing tenant and as such he was in possession of the shop and that Motilal committed criminal trespass by looking the shop. It was held that Kanhaiya Lal was not in possession of the shop at the time when trespass was committed 'either by himself or through any other person'. It was further held that when Motilal took possession of the shop he did so with the object of asserting his title to the shop, and not with the intent to annoy Kanhaiya Lal. We have no doubt that the Division Bench case was rightly decided on the facts as they existed in that case.

10. A few other cases were cited at the Bar but we do not think it necessary to refer to them. We have already indicated that in this case the possession of the property was with the complainant and the act of trespass committed by the applicant was done to annoy the complainant. The applicant was, therefore rightly convicted. The sentence errs on the side of leniency.

11. We dismiss the revision.