

# THE INDIAN PENAL CODE

## CHAPTER XVII OF OFFENCES AGAINST PROPERTY

### Of Theft

### Of Mischief

**[s 438] Punishment for the mischief described in section 437 committed by fire or explosive substance.**

**Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with <sup>647</sup> [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**

### COMMENT—

This section merely extends the principle laid down in the last section. It imposes higher penalty owing to the dangerous nature of the means used.

<sup>647</sup>. Subs. by Act 26 of 1955, section 117 and Sch, for "transportation for life" (w.e.f. 1 January 1956).

# **THE INDIAN PENAL CODE**

## **CHAPTER XVII OF OFFENCES AGAINST PROPERTY**

### **Of Theft**

### **Of Mischief**

**[s 439] Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.**

**Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**

### **COMMENT—**

This section punishes an act which is akin to piracy.

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### Of Theft

### Of Mischief

**[s 440] Mischief committed after preparation made for causing death or hurt.**

**Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.**

### COMMENT—

In order to attract the provisions of [section 440](#) read with [section 44, Penal Code](#), it is necessary to allege and establish the following three essentials which constitute the offence under the said sections:-

- (1) Intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person.
- (2) Causing the destruction of some property or any such change in any property or in the situation thereof; and
- (3) Such changes must result in destroying or diminishing the value or utility of any property or affecting it injuriously.

It is thus, plain that either destruction of property or some change in the property or in the situation which has the effect of destroying or diminishing the value or utility or, in any event, affecting it injuriously is necessary. The word 'property' used in this section really means some intangible property capable of being destroyed or damaged in its value or utility. It must be remembered that [section 440](#) read with [section 44, IPC, 1860](#) is an offence committed against the property. Sections 425 and 440 appear in the 17th chapter entitled "Offences against Property." If there is no allegation that mischief was committed through the medium of property as is visualised by [section 440](#) read with [section 425, IPC, 1860](#), it is plain that it cannot be validly said that an offence is constituted.<sup>648.</sup>

<sup>648.</sup> *Abid Ali Khan v Prabhakara Rao*, [1968 CR LJ 398](#) (Vol 74, C. N. 115)(AP); *Ramakant Rai v Madan rai*, [\(2003\) 12 SCC 395 \[LNIND 2003 SC 837\]](#) : [2004 Cr LJ 36](#) (SC)- Order of acquittal reversed.



# THE INDIAN PENAL CODE

## CHAPTER XVII OF OFFENCES AGAINST PROPERTY

### Of Theft

### Of Criminal Trespass

#### [s 441] Criminal trespass.

Whoever enters into or upon property in the possession of another<sup>1</sup> with intent to commit an offence<sup>2</sup> or to intimidate, insult or annoy any person in possession<sup>3</sup> of such property,

or having lawfully entered into or upon such property, unlawfully remains there<sup>4</sup> with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass".

#### State Amendments

**Orissa.**—Amendment by Orissa Act No. 22 of 1986 (w.e.f. 6-12-1986). Same as in Uttar Pradesh except that for the words "whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961" read "remains there", and omit "by the specified in the notice."

**Uttar Pradesh.**—The following amendments were made by U.P. Act No. 31 of 1961, section 2 (w.e.f. 13-11-1961).

For Section 441, substitute the following:—

"441. *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 Law (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, by the date specified in the notice,

is said to commit "criminal trespass".

#### COMMENT—

The word "trespass" in common english acceptation means and implies unlawful or unwarrantable intrusion upon land. It is a transgression of law or right, and a trespasser is a person, entering the premises of another with the knowledge that his entrance is in

excess of the permission that has been given to him.<sup>649</sup> The authors of the Code say: "We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it is attended with aggravating circumstances".<sup>650</sup>

### **[s 441.1] Ingredients.—**

The section requires—

- (1) Entry into or upon property in the possession of another.
- (2) If such entry is lawful, then unlawfully remaining upon such property.
- (3) Such entry or unlawful remaining must be with intent—
  - (a) to commit an offence; or
  - (b) to intimidate, insult, or annoy any person in possession of the property.

The use of criminal force is not a necessary ingredient.

**1. 'Enters into or upon property in the possession of another'.—**'Property' in this section means immovable corporeal property, and not incorporeal property such as a right of fishery,<sup>651</sup> or a right of ferry.<sup>652</sup> A person plying a boat for hire within the prohibited distance from a public ferry cannot be said, with reference to such ferry, to commit criminal trespass.<sup>653</sup>

The possession must be actual possession of some person other than the alleged trespasser.<sup>654</sup> The offence can only be committed against a person who is in actual physical possession of the property in question. If the complainant is not in actual possession of the property this offence cannot be committed.<sup>655</sup> But the offence may be committed even when the person in possession of the property is absent provided the entering into or upon the property is done with intent to do any of the acts mentioned in the section. Where a person entered upon a field that had been leased, during the absence of the lessee, and ploughed it, and the lessor came to the spot on hearing of it to prevent the commission of such acts, it was held that that was not enough to exonerate that person from intention to annoy the lessee and that such a person could be convicted of criminal trespass.<sup>656</sup> The mere taking of unlawful possession of a house will not amount to either criminal trespass or house-trespass. An unlawful act is not necessarily an offence. The house in question must be in actual possession of the complainant. Mere constructive possession is not sufficient.<sup>657</sup>

**2. 'Intent to commit an offence'.—**Where in a pen-down peaceful strike the employees of the bank entered the office and occupied their seats and refused to work during office hours and was wholly confined to regular working hours and the only act alleged against them was that they refused to vacate their seats when they were called upon to do so by the superior officers, it was held by the Supreme Court that the conduct of strikers did not amount to criminal trespass.<sup>658</sup>

**3. 'Or to intimidate, insult or annoy any person in possession'.—**In order to establish that the entry on the property was with intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the main aim of the entry; it is not sufficient to show merely that the natural

consequence of the entry was likely to be annoyance, intimidation or insult and this was known to the accused.<sup>659</sup>

The word 'intimidate' must be understood in its ordinary sense "to overawe, to put in fear, by a show of force or threats of violence".<sup>660</sup>

The Supreme Court has held that this section does not require that the intention must be to annoy a person who is actually present at the time of the trespass.<sup>661</sup>

**4. 'Having lawfully entered into or upon such property, unlawfully remains there'.—** The original entry may be lawful, but if the person entering remains on the property with the intent specified in the section he commits trespass. Where a person armed with weapons went on land of which he was the owner when no one else was there at the time and refused to vacate it, when called upon to do so by a person who had no right to the land, it was held that the owner did not remain on the land unlawfully and was not therefore, guilty of the offence of criminal trespass.<sup>662</sup>

#### **[s 441.2] *Bona fide* claim.—**

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land, he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence.<sup>663</sup> *Bona fide* claim of right, however ill-founded, nullifies a case of criminal trespass.<sup>664</sup> Where certain hutment dwellers of Bombay were facing demolition for having erected their huts on public footpaths and pavements, the Supreme Court held that no offence under the section was made out. Their act was not voluntary. It was the dictate of their moral right to survive and their state of helplessness. They did not intend to commit an offence or to intimidate, insult or annoy any person in possession and that is the gist of the offence of criminal trespass under section 441.<sup>665</sup> Where the accused continued in possession of the tenanted premises even after the expiry of the lease period, he could not be said to be in unauthorised possession and to have committed trespass.<sup>666</sup>

#### **[s 441.3] Dispute as to possession in civil suit.—**

Where dispute regarding possession of a property was pending in a civil suit, there could be no trespass in respect of that property. The complainant must be in unquestionable possession of property at the time of alleged trespass.<sup>667</sup>

#### **[s 441.4] Honest civil trespass.—**

A Judicial Magistrate was posted at a place where no Government accommodation was available. He, therefore, stayed in a room in a *dak* bungalow. When he went away on leave, he locked his household effects in the room. A junior engineer broke open the lock and shifted the belongings to another room as a senior official was to visit the area. On return, the Magistrate filed an FIR against the junior engineer and cognizance of the offence was taken. It was held that the engineer was not actuated with any dishonest intention and it was a case of honest civil trespass for which no cognizance could be taken.<sup>668</sup>

### [s 441.5] Uttar Pradesh Amendment.—

The effect of the Uttar Pradesh amendment was considered by the Allahabad High Court in *Somnath Paul v Ram Bharose*.<sup>669</sup> The amendment has the effect of converting a civil trespass into a criminal trespass when the entry into, or retention of, premises is for the purpose of taking unauthorised possession or making unauthorised use. Going by the earlier authorities, the court held that refusal to vacate premises after revocation of licence under which possession was given would not by itself constitute a criminal trespass. The intent to do the acts stated in the amendment must also be proved.<sup>670</sup>

### [s 441.6] Orissa Amendment.—

Section 441, IPC, 1860, as amended by Orissa Act, 22 of 1986, defines criminal trespass, which, when committed in respect of, *inter alia*, a human dwelling, becomes an offence punishable under section 448, IPC, 1860. Ordinarily, a dispute between the tenant and the landlord regarding vacation of a premise after expiry of the period of tenancy is a civil dispute, unless an offence of criminal trespass can be said to have been committed. Prosecution against the tenant would not lie except the cases covered by the Orissa Amendment. Section 441, IPC, 1860, which has been defined by Orissa Act, 22 of 1986, is quoted hereunder for better appreciation:

..... 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 lawfully entered into or upon such property, remains there with the intention of taking unauthorised possession or making unauthorised use of such property and 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 on him, is said to commit criminal trespass.

The aforesaid section consists of three parts. The first two parts are same and similar to that of the original section of the IPC, 1860. The third part, with which the charge is concerned, says that if the person has lawfully entered into the premises and remains there with intention of (i) taking unauthorised possession or (ii) making unauthorised use of such property or (iii) fails to withdraw from such property or its possession or use when called upon to do so by notice in writing duly served on him, he is said to have committed the offence.<sup>671</sup> The rigors of section 441, IPC, 1860 as amended by the Orissa Act, 22 of the 198 shall not be applicable to the following cases:

- (i) *Statutory tenants whose tenancy is governed by any statute.*

*(They are protected by tenancy laws like Public Premises Eviction Act, etc.)*

- (ii) *Tenant who has entered into possession by virtue of a lease.*

*(Rights of such tenant are governed under the provisions of the Transfer of Property Act and the Specific Relief Act and he acquires a right of possession. After determination of tenancy by notice, he would become "Tenant holding over" "Tenant on sufferance" or "Tenant at will" as the case may be. His possession being juridical, is protected. He can be evicted only in due process of law. The possession of such tenant cannot be equated with that of trespassers.)*

- (iii) *Person who has entered into possession by virtue of some covenant like, agreement to sell, will etc. and/or put forth a genuine right over the property possessed.*

(If a person claims a right of title coupled with possession, till the dispute is adjudicated, his possession cannot be conclusively said to be that of a trespasser and his right to possess would be subject to the result of the suit or legal proceeding.)<sup>672</sup>



649. *Kewal Chand v SK Sen*, AIR 2001 SC 2569 [LNIND 2001 SC 1415] : (2001) 6 SCC 512 [LNIND 2001 SC 1415] .
650. Note N, p 168.
651. *Charu Nayiah*, (1877) 2 Cal 354 .
652. *Muthra v Jawahir*, (1877) 1 All 527 .
653. *Ibid*.
654. *Foujdar*, (1878) PR No. 28 of 1878; *Kunjilal v State*, (1913) 12 ALJR 151.
655. *Bismillah*, (1928) 3 Luck 661 .
656. *Venkatesu v Kesamma*, (1930) 54 Mad 515.
657. *Satish Chandra Modak*, (1949) 2 Cal 171 .
658. *Punjab National Bank v AIPNBE Federation*, AIR 1960 SC 160 [LNIND 1959 SC 166] .
659. *Mathri v State*, AIR 1964 SC 986 [LNIND 1963 SC 292] . *Sujya v State of Rajasthan*, 2003 Cr LJ 1612 (Raj), entering the field of another and releasing cows to graze there, revenue records showed that the victims were *khatedars* of the field, the trespassers caused injuries on resistance, guilty of criminal trespass. They have no right of private defence.
660. *TH Bird*, (1933) 13 Pat 268.
661. *Rash Behari v Fagu Shaw*, (1970) 1 SCR 425 [LNIND 1969 SC 192] .
662. *Adalat*, (1945) 24 Pat 519. The offence is of continuing nature within the meaning of section 472 Cr PC. The offence would be continuing so long as the trespass is not lifted or vacated or insult etc. of the person lawfully in possession is not stopped. *Gokak Patel Valkart Ltd v Dundayya Gurushiddaiah Hiremath*, (1991) 71 Com Cases 403 : (1991) 2 SCC 141 [LNIND 1991 SC 878] . *Akapati Bhaskar Patro v Trinath Sahu*, 2002 Cr LJ 3397 (Ori), by virtue of the Orissa Amendment and even otherwise also a tenant remaining in possession even after termination notice does not commit the offence of mischief by trespass. His possession is not unlawful.
663. *Budh Singh*, (1879) 2 All 101 , 103.
664. *Manik Chand*, 1975 Cr LJ 1044 (Bom); *Santosh Kumar Biswas*, 1979 Cr LJ NOC 79 (Cal).
665. *Olga Tellis v Bombay MC*, (1985) 3 SCC 545 [LNIND 1985 SC 215] : AIR 1986 SC 180 [LNIND 1985 SC 215] . For an analysis of the wider implications of this decision, see TN Singh, *Ex Curia : Tulsiram Patel v Olga Tellis*, (1987) 29 JI LI 547.
666. *S Subramaniam v State of UP*, 1996 Cr LJ 929 (All).
667. *State of Goa v Pedro Lopes*, 1996 Cr LJ 256 (Bom).
668. *Bagirath Singh v State of Rajasthan*, 1992 Cr LJ 3934 (Raj).
669. *Somnath Paul v Ram Bharose*, 1991 Cr LJ 2499 (All).
670. The court followed *Punjab National Bank v AIP NBE Federation*, AIR 1960 SC 160 [LNIND 1959 SC 166] , entry of employees on pen down strike; *Kanwal Sood v Nawal Kishore*, AIR 1983 SC 159 [LNIND 1982 SC 180] : 1983 Cr LJ 173 : (1983) 3 SCC 25 [LNIND 1982 SC 180] , refusal to vacate premises after the death of testator; *Sinnasamy v King*, 1951 AC 83 (PC), entry with *bona fide* belief in right to do so; *Jawanmal v Bhanwari*, AIR 1958 Raj 214 [LNIND 1958 RAJ 237] : 1958 Cr LJ 1099 , *bona fide* belief; *Babu Ram v State of UP*, 1971 All LJ 4, *bona fide* belief; *Mahabir Pd v State*, 1976 Cr LJ 245 , notice under section 447; *Rashid Ad v Rashidan*, 1980 All LJ

939, effect of UP Amendment, lawful entry becoming criminal trespass; *DP Titus v LW Lyall*, [1981](#)

[Cr LJ 68](#), lawful entry, subsequent unauthorised use.

[671](#). *Abdul Samad v Md. Qamruddin*, [2007 Cr LJ. 4383](#) (Ori).

[672](#). *Kumar Debasish v State of Orissa*, [2008 Cr LJ 2397](#) (Ori).