Chandi Kumar Das Karmarkar And Anr. vs Abanidhar Roy on 9 October, 1963

Equivalent citations: AIR1965SC585, 1965CRILJ496, AIR 1965 SUPREME COURT 585, 1964 ALL. L. J. 66, (1964) 1 SCWR 92, 1964 ALLCRIR 129, 1964 SCD 287, (1964) 1 SCJ 419, 1964 MADLJ(CRI) 238

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Bench: B.P. Sinha, M. Hidayatullah, K.C. Das Gupta

JUDGMENT

M. Hidayatullah, J.

1. The two appellants who have filed this appeal by special leave have been convicted under Section 329, Indian Penal Code and sentenced to a fine of Rs. 100/- each or in default of fine to suffer simple imprisonment for one month by the High Court of Calcutta after reversing their acquittal by the Additional Sessions Judge, Burdwan. Originally five named and sixteen un-named persons were charged under Sections 147,447,379 and 504/352, Indian Penal Code but the Magistrate 1st Class Katwa convicted me two appellants under Section 379, Indian Penal Code only. The charge under Section 379, Indian Penal Code against them was that on 13th and or 14th day of January 1958, they committed theft of fish by fishing in a tank called Nutan pukur in Kutalghosh mouza P.S. Mongolkote which was in the possession of the complainant Abanidhar Roy, the Respondent before us. Nutan pukur is a tank which with its banks and wet and dry portions measures about 7.21 acres. The water covers about 3/4 of the area. In the Parcha of Mouza Kotalghosh, the two appellants with three others are shown as tenants with their interest described as "settled raiyot Mukurari" and the sixteen annas superior interest is described as belonging to Banbehari Dutta and others.

2. The complainant Abanidhar Roy claimed to be in possession of Nutan pukur as a result of bhag settlement for five years with Sailesh Chandra Banerjee (P. W. 2) under an Amalnama dated June 15, 1959. His case was that after obtaining possession he had reared fish in this tank by putting in fry but the present appellants and some others caught fish on the above-mentioned dates after fish had grown to be right size. The defence of the appellants was that they were recorded as tenants in respect of this tank under a jama of Rs. 4/6/-and were in possession. They denied that they caught fish on the two dates or at all and in the alternative contended that even if they did, it was in the bona fide exercise of their claim of right. The complainant stated that the interest of the Duttas was sold in a revenue sale and was purchased by Sailesh Chandra Banerjee and further that Banerjee had obtained possession of the tank after a decree in a title suit filed by him against the Duttas and the present appellant and some others. That suit was T.S. 203/1954 in the Court of the Second Munsiff,

Burdwan. The decree in that suit was passed ex-parte on December 6, 1954. On the strength of that decree Sailesh Chandra claimed to have obtained possession of the tank on February 27, 1955 (vide warrant for delivery of possession and Bailiff's report Exh. 3 and 4). The appellants and some other defendants however moved the learned second Munsiff, Burdwan under Order 9 Rule 13, Civil Procedure Code to set aside the ex-parte decree on the averment that Sailesh Chandra Banerjee in collusion with certain court functionaries had suppressed the summons and it was served on the defendants in the case. That case was registered as Misc. case No. 64 of 1955 and on July 26, 1955, the ex-parte decree was set aside on the ground that the defendants were not served. Sailesh Chandra Banerjee filed a revision application in the High Court but it was dismissed on January 14, 1957. During these proceedings Sailesh Chandra Banerjee had given an undertaking that he would not cut down any trees on the banks till the disposal of the miscellaneous case thereby admitting that there was a dispute with respect to the ownership and possession of the tank.

3. The Magistrate 1st Class, Katwa who decided the criminal case stated his conclusion thus :

> "even if the accused bona fide believed, rightly or wrongly that as soon as the ex-parte decree was set aside, they were entitled to possess the tank, they cannot be regarded as to have bona fide believed that they were entitled to catch fish and take it wholly without giving the bhagidar P. W. I. who grew the fish his half share. So I find that the accused are not entitled to come under a bona fide claim of right"

The Additional Sessions Judge, Burdwan held that the appellants had acted in the bona fide exercise of their claim of right and they could not be held guilty of an offence of theft under Section 379, Indian Penal Code. The High Court on appeal pointed out that the two concurrent findings were that Abanidhar Roy was in physical possession of the tank from June 15, 1955 as a lessee from Sailesh Chandra Banerjee and that the appellants had caught fish from the tank on two dates. On these findings Mr. Justice S.K. Niyogi posed the questions which arose for decision in the case in the following words :

> "So the important question that arises for decision is whether in removing the fishes from; the tank in the actual possession of the complainant the accused persons may be said to have caught the same dishonestly and the said removal was for the purpose of making wrongful gain to themselves."

This question was the right question to consider Niyogi J. on an examination of the above facts held that the removal of fish by the appellants was dishonest and they did it with a view to making a wrongful gain to themselves and that the "finding of the learned Additional Sessions Judge must be interfered with". In this appeal it is contended that the learned single Judge erred in reversing this finding.

4. The offence of theft consists in the dishonest taking of any moveable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete. Fish in their free state

are regarded as ferae naturae but they are said to be in the possession of a person who has possession of any expanse of water such as a tank, where they live but from where they cannot escape. Fishes are also regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot known as a fishery but only within that spot. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any bona fide claim of right.

5. Now the ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim I of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. This court in Criminal Appeal No. 31 of 1961, D/- 5-10-1961, S. Sanyasi Apparao v. Boddepalli Lakshminarayana observed as follows:

> "It is settled law that where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft, Unless there be not only no legal right but no appearance or colour of a legal right."

By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however weak. This Court observed in the same case that the law was stated in 2 East PC 659 to be :

> "If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal."

and referred to 1 Hale PC 509 that "the best evidence is that the goods were taken quite openly". The law stated by East and Hale has always been the law on the subject of theft in India and numerous cases decided by Indian Courts are to be found in which these principles have been applied.

6. Niyogi J. in his judgment also referred to some of the decisions of the Calcutta High Court and we find ourselves in particular agreement with the following statement of the law in Hamid Ali Bepari v. Emperor ILR 52 Cal 1015 : (AIR 1926 Cal 149):

> "It is not theft if a person, acting under a mistaken notion of law and believing that certain property is his and that he has the right to take the same . . . . . removes such property from the possession of another."

7. The question that arises is whether the finding of the Additional Sessions Judge, Burdwan that there was no dishonest intention could be said to be wrong and required to be set aside? In this case the complainant filed the complaint against 21 persons charging them with numerous offences one of them being theft. The Magistrate summoned only three persons and framed a charge under Section 379, Indian Penal Code. One of the three persons was acquitted and the two appellants were convicted. It is clear that the case was much exaggerated by the complainant. Theft, was said to have taken place on the 13th and 14th January, 1.958. There was hardly any evidence about the occurrence on the first date and even the evidence in respect of the second day was slender and

interested. But as it has been believed we do not say more and accept the finding that fish were caught by the appellants at least on one day. The accused no doubt denied catching fish and this might have shown that they had a dishonest intention but they also brought evidence to prove alternatively that after clearing the tank of weeds they had caught fish for some religious ceremony not on the two dates alleged but four days earlier. This: was. said to have been done under a bona fide claim of right and their plea was accepted by the Additional Sessions Judge, Burdwan.

Niyogi J.

8. reversed the finding by taking into consideration certain other circumstances. The learned Judge discarded the evidence of the Record of Rights on the ground that there was nothing to show that the entry was made before the date of the alleged occurrence or had influenced the appellants in believing bona fide that they had a claim of right to the tank and the fish in it. He also referred to the possession of Sailesh Chandra Banerjee obtained by him under the ex parte decree which possession, according to the learned Judge, continued. He also pointed out that the appellants caught fish only when the fry had grown to the right size but there was no assertion of the right on any earlier occasion.

9. That there was a dispute between the parties which had not till then been decided by the Civil Court goes without saying. The facts, do show that the decree was obtained by unfair means and the possession was tainted by fraud. Of course by the setting aside of the ex parte decree possession would not revert without proceedings for restitution, but the circumstances undoubtedly were such that the appellants might well have thought that their possession stood restored. This belief was not, lessened by the grant of a temporary injunction and its withdrawal on the assurance, of Sailesh Chandra Banerjee that during the pendency of the proceedings he would not exercise certain rights of ownership. Further the transaction between Abanidhar Roy and Sailesh Chandra Banerjee during the pendency of the Civil Case was not binding on the appellants. There was thus a real dispute and in a manner of speaking also a recognition that a rival, claim in respect of the tank did exist. In these circumstances it was not improbable that, the appellants considered that after the setting aside of the ex parte decree and the giving of the undertaking by Sailesh Chandra Banerjee they were entitled as the recorded tenants, to catch fish for a ceremony in their house. That they did it only once does not prove lack of bona fides but rather the contrary. All the embellishments in the case about unlawful assembly, riot, force and threats have not been believed and the catching of the fish in this big tank with nets was done quite openly.

10. In our opinion there was an absence of the animus furandi and the circumstances bring this case within the rule that where the taking of moveable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft. In this view of the matter we are of opinion that the acquittal of the appellants ought not to have been set aside. We according allow the appeal and setting aside the conviction of the appellants order their acquittal. The fines if recovered shall be refunded to them.