

Allahabad High Court

State Of U.P. vs Raja Ram on 18 September, 1975

Equivalent citations: 1976 CriLJ 1222

Author: S Malik

Bench: S Malik

JUDGMENT S. Malik, J.

1. This is an appeal by the State against the judgment dated 5-3-1966 of the Judicial Magistrate, Handia, Allahabad, acquitting the accused opposite party, namely, Raja Ram of the charge framed against him for an offence punishable under Section 447 of the Indian Penal Code.
2. The appeal first came up before another Bench of this Court and was disposed of on the 3rd September, 1970. "The judgment disposing of this appeal was subsequently set aside on an application moved on behalf of the accused opposite party stating that the case was listed without the name of the learned Counsel for the accused opposite party and, therefore, the accused opposite party had no information and could not defend himself.
3. The facts are simple. As has been found by the learned Magistrate, Raja Ram constructed a house over an area 23' X 18' at a distance of 45 ft. 7 inches from the southern end of national highway No. 2, or in other words, the Grand Trunk Road between Allahabad and Varanasi to the south of the first furlong stone beyond the milestone showing 475 miles from Calcutta,
4. According to the prosecution P.W. 3 Durga Prasad, Mate of the Public Works Department of the State, found the accused constructing the house when he inspected the area on the 13th July, 1962, He at once gave a notice to the accused pointing out that he was making the construction within the controlled area or within the boundaries of the national highway and, therefore, it was unauthorised construction, It is said that in spite of the notice the accused completed the construction. Thereafter, the complaint in question was filed by the Assistant Engineer III, Provincial Division, P.W. D., Allahabad and on its basis the accused was tried for an offence punishable under Section 447 of the Indian Penal Code.
5. The accused pleaded not guilty. According to him, the house in question is outside the boundary of the Grand Trunk Road and stands on the land belonging to Gram Sabha Bhairampur and the accused built the house with the permission of the Gram Pradhan. He further alleged that in the past he was prosecuted regarding this very construction on complaints made by the P.W. D. twice, and, therefore, the present complaint is liable to be dismissed.
6. The prosecution to prove its case examined three witnesses, P.W. 1 is R. B. Tripathi the then Encroachment clerk of the Public Works Department, Allahabad, who proved the notice (Ex. Ka-1) served on the accused, the report (Ex. Ka-2) submitted by the Mate P.W. 3, Durga Prasad, Ex. Ka-3 the complaint filed by the Asstt. Engineer and Ex. Ka-4 the site plan prepared by the Mate. Besides proving these documents, the witness stated that the construction in question is only 48' from the Grand Trunk Road and the accused was found building it on the 13th of July, 1965. He further stated that the Road vested in the State Government under a notification issued by the Union Government under the National Highways Act and the Public Works Department manages the Road. P.W. 2 Dina Nath was the Lekhpal of the area. He proved that the Grand Trunk

Road at the place where the disputed construction stands, comprised Plot No, 1227 and that where the house has been constructed, its width is 21 latthas, P.W. is Durga Prasad, Mate, already mentioned.

7. The accused examined two witnesses. D. W. 1 Kedar Nath was the Sabhapati of Bhairampur and D.W. 2 was one of the members of the Gaon Sabha. They were examined to prove that the house in question was built in the year 1961 and it is situate on Gram Sabha land and was built with the permission of the Sabhapati.

8. The learned Magistrate made a local inspection. As will appear from the impugned judgment, he rightly found that there is nothing on the record to show that the accused in the past had been prosecuted regarding the encroachment made by him by constructing the house in question. According to the lower court, the accused appears to have been prosecuted in the past in respect of another house lying just to the south of the house in question and that, as already mentioned, the present construction is clearly within the limits of the Grand Trunk Road and, therefore, was built by encroaching on land appurtenant to the Highway.

9. The learned Magistrate, keeping in view observations made in the three rulings referred to in his judgment came to the conclusion that the accused could not be convicted of an offence punishable under Section 447 of the Indian Penal Code because the complainant or in other words, the Public Works Department was not in actual physical possession of the area encroached upon and with this finding the complaint was dismissed,

10. When the appeal first came up before another Bench of this Court in the year 1969, that Bench referred the question as to whether the words "property in the possession of another" appearing in Section 441 of the Indian Penal Code mean 'actual physical possession' to a Division Bench because the learned Judge found divergence of opinion on the point in decisions of different High Courts. The question was considered and answered by the Division Bench of this Court by its order dated August 11, 1970 and it was held, In order to constitute possession within the meaning of Section 441 of the Indian Penal Code, the complainant must be in actual physical possession of the property either by himself or through his wife, servant, agent, licensee or other person, following the observations made in *Moti Lal v. Emperor* AIR 1925 All 540 : 26 Cri LJ 1273.

11. It was urged on behalf of the State that the question be re-referred to a Full Bench because according to the learned Counsel for the State, the answer given by the Division Bench does not appear to be sound. The contention put forward on behalf of the State is not without force. It was pointed out that a perusal of Section 441 of the Indian Penal Code will show that the words used in it are "in possession of another" and not "in actual physical possession of another". The words appearing in Section 441 of the Indian Penal Code were interpreted to mean "actual physical possession" because it was found that it was not possible for the trespasser to intimidate, insult or annoy a person not in actual physical possession and only in constructive possession of the property trespassed upon. While answering the question referred to it, the Division Bench in support of its answer, dealt with the question in great detail and repeating the same would serve no purpose. If I may say so with respect, I agree with the interpretation of the words 'property in possession of another' appearing in Section 441 of the Indian Penal Code as it stood before the Criminal Laws (U. P. Amendment) Act, 1961 (Act XXXI of 1961) came into force. In my opinion, the answer recorded by the Division Bench requires reconsideration as regards the portion added to the original Section 441 of the Indian Penal Code by the said amendment. Before the amendment, to quote the Division Bench, the essential ingredients for 'criminal trespass' as laid down in Section 441 of the Indian Penal Code were:

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

12. It was pointed out that by the Amending Act the original Section 441 of the Indian Penal Code has been retained and the following has been added:

or, having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (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'.

13. A perusal of what has been added by the amendment makes it clear that it will also amount to 'criminal trespass' if it is proved that entry into or upon 'such property' was with the intention of taking unauthorised possession or making unauthorised use of such property', the trespasser failed 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. These ingredients do not require either that entry into or upon the property in question should have been with the intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. In my view, therefore, even if a person was in constructive possession of the property and not in actual physical possession, an offence of criminal trespass would be made out once it is proved that the trespasser while entering into or upon the property did so with the intention of taking unauthorised possession or making unauthorised use of the property and also that when the trespasser was asked to withdraw from the property by a notice as laid down in the amended section he failed to withdraw from it. It is, therefore, doubtful whether 'actual physical' possession' is a necessary ingredient in respect of a 'criminal trespass' covered by the portion added to the old sections by the amendment. It appears that in order to bring to book a person who taking advantage of the absence of the owner or the person in constructive possession of a property enters into 'such property' knowing full well that it did not belong to him, in order to take unauthorised possession or make unauthorised use of such property the amended portion was added. If 'actual physical possession of the property' is made an essential ingredient for 'criminal trespass' within the meaning of the added portion under the amendment, the portion added to Section 441 of the Indian Penal Code by the amendment would become almost superfluous,

14. The Division Bench while answering the question has laid stress on the words 'such property' appearing in the amended portion added to the original Section 441 of the Indian Penal Code. It is true that by the words 'such property' the Legislature meant 'property in possession of another' appearing in the first part of Section 441 of the Indian Penal Code. The question to be considered is whether the words 'such property' or 'property in possession of another' should also be interpreted to mean 'actual physical possession' in a case in which the

trespasser having entered into or upon such property 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 a written notice as laid down in the portion added by the amendment. As has already been pointed out, in order to constitute an offence of 'criminal trespass' under the provisions of the portion added to Section 441 of the Indian Penal Code by the amendment it is not necessary that entry into or upon such property should have been with the intent to commit an offence or to intimidate, insult or annoy the person in possession. In other words, the reason for which it was held in the various rulings referred to by the Division Bench which were all of a period prior to the amendment, that the words "in possession of another" mean 'actual physical possession' do not exist in the portion added by the amendment. And, therefore, I fail to see why the words 'property in possession of another' should be interpreted to mean 'actual physical possession' for an offence of 'criminal trespass' falling under the portion added to Section 441 of the Indian Penal Code by the amendment. To be more precise, in my opinion as it is not possible to intimidate, insult or annoy the person in possession at the time of the trespass unless that person is in actual physical possession, to constitute 'criminal trespass' within the meaning of the first part which is the same as was the original Section 441 I.P.C., 'possession' means 'actual physical possession'. But as under the portion added by the amendment the only ingredients the prosecution must prove in order to make out a case of 'criminal trespass' are that the trespasser must have entered into or upon possession of property in possession of another with the intention of taking unauthorised possession or making unauthorised use of that property, there is no reason why the possession of the aggrieved party should have been 'actual physical possession'. Even if the trespasser is found to have taken possession of a property in possession of another during the absence of that another while the property was lying uncared for, an offence of 'criminal trespass' will be made out if it is proved that the accused had entered into or upon the property with the intention of taking unauthorised possession or making unauthorised use of such property and he failed to withdraw from such property when the person in constructive possession later came to know about the trespass and served on the trespasser a notice calling upon the trespasser to withdraw from the property in accordance with the portion added by the amendment to Section 441, Indian Penal Code.

15. TO dispose of this appeal it does not appear necessary to enter into the question whether the words 'property in possession' mean 'actual physical possession' and, therefore, I do not think it proper to further delay the disposal of this old appeal by re-referring the question to a larger bench.

16. It appears that the learned Magistrate rightly observed that the accused entered into possession of the land in good faith believing that the land belonged to the Gram Sabha. The prosecution has not proved that there was any publication or by any other mode it was brought to the notice of the inhabitants of the village before the year in question that the National Highway existed beyond the area over which the accused entered into possession. The statement made by P.W. 3 Durga Prasad, Mate, is not very convincing. The prosecution's own witness P.W. 2 the Lekhpal of the area, stated that the house in question had been built before 1964. From the inspection note prepared by the lower court together with the map it is apparent that the present construction is in continuation of an old construction. Regarding the old construction there appears to have been litigation between the parties right upto the High Court and it appears that the accused was successful. Therefore, the accused could have honestly believed that the area was not a part of the Highway. At least nothing has been brought on the record even of a circumstantial nature to prove otherwise. It has also come in evidence that the site in question lies across a Nala from the Grant Trunk Road and the accused took the plea that he built the house on Gram Samaj land. Under the circumstances, it cannot be said that it has been proved that the accused

when he took possession of the land did so knowing that the land belonged to the State Government or was a part of the National Highway or that he took possession of the area with the intention of taking unauthorised possession or making unauthorised use of the land within the meaning of Section 441 of the Indian Penal Code. It may, however, be observed that from the material on the record, it does appear that the house was built on a portion of the land appurtenant to the Highway.

17. In view of the reasons discussed, this is a case of a civil nature. After considering the entire evidence on the record, I dismiss the appeal. If any amount has been realised from the accused as fine, in view of the judgment of this Court passed earlier in the case, the same shall be refunded.