

(1879) 10 AHC CK 0001

Allahabad High Court

Case No: None

In Re: Gobind Prasad
and Another

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 15, 1879

Citation: (1880) ILR (All) 465

Hon'ble Judges: Straight, J

Bench: Single Bench

Final Decision: Disposed Of

Judgement

Straight, J.

This is an application for revision u/s 297, Criminal Procedure Code, of an order of the Magistrate of Mirzapur, passed upon the 3rd of September last, convicting two persons, namely one Gobind Prasad and Chaurasi, his wife, of criminal trespass u/s 441, Penal Code. The case has been very fully and exhaustively discussed before me by the pleaders on both sides, and I must frankly say, that I have experienced the greatest difficulty in forming any determinate opinion upon it. This has arisen from the unusually vague and elastic language used in Section 441, which, if not closely scrutinized and strictly interpreted, might lead to its application to sets of facts or circumstances, for which it was never intended by the Legislative authorities who framed it. For it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, and which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in a criminal Court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain that its scope must be confined within those bounds that common sense and sound reason dictate. In this view let us see what the words of the section practically enact, and how they are to be practically applied. First, there must be an unauthorized entry into or upon property,--unauthorised, that is to say, either

directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits; or, again, if the entry has been lawfully and legitimately obtained, there must be an unlawful "remaining," either directly or constructively against the will of the person in possession, to be judged by the tests already explained. In either case, the unlawful entry or unlawful remaining must be with intent (i) to commit an offence, (ii) to intimidate, (iii) to insult, (iv) to annoy, any person in possession of the property. As to these intents, the first three are sufficiently explicit by the light of Sections 40, 503 and 504 of the Penal Code, but as to the fourth, very grave difficulty arises to ascertain what is or is not meant. Is the word "annoy" to be taken in its fullest and most general sense, or with what limitations is it to be construed? The varieties and differences of human temperament are so innumerable that it is next to impossible to estimate to what lengths a literal definition might not extend. It is a matter of daily observation, that what will annoy one man will not disturb an emotion in another; and in a vast community like the native population of this country, the endless fancies, feelings and prejudices, religious or caste-born, necessarily are stronger and more sensitive with one set of persons than with another. It must, therefore, be that the word "annoy" in this Section 441 must have some plain and intelligible construction placed upon it, and its application must not be left to depend upon each individual case and the peculiarities of character or idiosyncrasies of feeling of the special person who comes forward to complain. It seems to me that the word "annoy" in Section 441 must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.

2. I cannot agree in the argument of the pleader who appeared to support the conviction, that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by Section 441. Because an act is illegal in the sense that it is a breach of a man's duties and obligations under the civil law to obey and submit to any process that is sought to be enforced against him by execution or otherwise, it does not follow as a necessary consequence that that act is criminally unlawful and therefore punishable. The intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires.

3. So far I have dealt with the intent to annoy. But with intent to annoy whom? "Any person in possession of such property." Then the question arises what sort of possession is here intended, express or implied, constructive, in the sense of "legally entitled to," or actual, as contemplated in Section 530, Criminal Procedure Code. As to this last-mentioned provision, it is plain that, in the interest of public peace, it may be used to declare and protect the possession of a mere trespasser until he is "ousted by due course of law." How far a person in that position could invoke the

provisions of Section 441 of the Penal Code against the party "legally entitled to possession," for making an entry upon property in the occupation of the trespasser, I am not prepared here to discuss. That would be opening up the discussion of a question of so expansive a character that, as it is unnecessary for the purposes of the decision of the present case, I avoid entering upon it. Suffice it that, to deal with the matter before me, I am of opinion the possession contemplated and intended by Section 441, must be actual in the sense and meaning of Section 530, * Criminal Procedure Code.

4. Having thus dealt with the legal aspects of Section 441, let us see in what way it can be applied to the present case, the circumstances of which are as follows:--On the 16th January 1873, Gobind Prasad, Chaurasi his wife, and his brother Kalika, jointly mortgaged to one Ram Ratan Das four houses, two situate in Narghat, in Muzaffarganj mohalla, and one at Tirmohani, for an advance of Rs. 2,000. It was stipulated by the deed that the loan should be repaid within six months, otherwise it would become a deed of conditional sale. Neither the capital sum nor any portion of it was repaid within the time mentioned, and on the 12th February 1874, notice as required by s. 8 of Regulation XVII of 1806 was duly issued. Some arrangement then appears to have been come to between the mortgagors and the mortgagee, the result of which was that, on the 4th July 1874, the two houses at Narghat were sold for Rs. 833-8-0 and the proceeds of such sale were handed over to Ram Ratan Das. The year's grace from the notice of February 1874, ran out, but no further steps were taken by the mortgagee, who on the 15th March 1875, accepted a further sum of Rs. 300 on account of his debt, thus making a total of Rs. 1,133-8-0 paid in satisfaction of the original principal sum of Rs. 2,000. On the 24th August 1876, an order of foreclosure was made and issued. Thereupon a suit for possession was instituted, which was met by the defence that, as the plaintiff had accepted the payments before mentioned, his claim to foreclosure was barred. The Subordinate Judge of Mirzapur, who tried that case, decided in the plaintiff's favour, and against his decision Chaurasi and Kalika appealed. The judgment, however, stood good as against Gobind Prasad, who, on the 25th June 1877, executed an agreement by which he promised to pay the balance due, with interest, within one year, failing which the plaintiff should have a decree for possession. It was intended that Kalika and Chaurasi should be parties to that document, but as a matter of fact they were not: on the contrary, they lodged an appeal against the Subordinate Judge's decision, which was heard on the 29th November 1877, and resulted in their favour. Gobind Prasad failed to fulfil the terms of the agreement, and the twelve months having elapsed and principal and interest not having been paid, Ram Ratan Das applied to be placed in possession of the two houses in Muzaffarganj mohalla and Tirmohani. To this Gobind Prasad objected: firstly that the grounds upon which the appeal of Kalika and Chaurasi had been allowed applied equally to him as a matter of defence to the plaintiff's claim; secondly that the houses were the joint property of himself and the other two mortgagors of the mortgage-deed of 1873. The

Subordinate Judge passed an order of possession on the 2nd November 1878, against which Gobind Prasad appealed to the Judge, and his case came on for hearing and was disposed of on the 14th November 1878, the appeal being dismissed. Meanwhile, on the 11th November, the amin of the Court had gone to give possession of the house in Muzaffarganj mohalla to Ram Ratan Das, but he there found Kalika and an agent of Chaurasi on the chabutra, who said they owned a share of the house "and objected, and so I went back and reported to the Court." A few days later another amin was sent, who gave possession as directed by Section 264 of the Civil Procedure Code, Kalika objecting and Gobind Prasad being upon the premises at the time. This was the full extent of possession ever obtained by Ram Ratan Das. Between November 1878 and April 1879 disputes continued between the parties, and instead of directing his attention towards obtaining possession of the house in question by due process of law, Ram Ratan Das seems to have resorted to the Criminal Court for sureties of the peace by Gobind Prasad and his relations, no doubt with a view of making a cheap short cut to secure his object, namely, to force a surrender of the property. Ultimately, early in April, he preferred a charge u/s 441 against Gobind Prasad and Chaurasi for criminal trespass, which he alleged to have taken place on the 15th April, For some reason best known to himself the Magistrate, instead of taking up the case under the section upon which complaint had been made, proceeded of his own motion to deal with the matter u/s 530, Criminal Procedure Code, and on the 8th May he found that Gobind Prasad and his wife were in possession of the house, but he directed them "to clear out within 10 days." This most irregular order, made in the teeth of the words of the section, came up to this Court for revision and was necessarily quashed by Mr. Justice OLDFIELD, who directed that the possession of Chaurasi must be maintained, while he at the same time pointed out that the complaint u/s 441 should be disposed of.

5. On the 14th July Gobind Prasad and his wife appeared before the Magistrate, to answer the charge u/s 441 for the alleged trespass on the 15th April, and after a hearing they were on the 14th July convicted and fined one rupee. They took no steps to set this conviction aside, and on the 1st September a second complaint was lodged before another Magistrate against them for an alleged trespass on the 14th July, the very day when they had been in attendance at the Magistrate's Court. Upon this charge, after they had been given twenty-four hours" grace to turn out of the house, they were, on the 3rd September, convicted and fined Rs. 200 each. It is that conviction and sentence that now comes before this Court for revision. The only other facts that should be recapitulated are that, on the 17th February, Gobind Prasad had filed an application to be declared insolvent, which was rejected by the first Court, but granted on appeal to this Court, and that on neither occasion before the Magistrate did Ram Ratan Das himself appear as a witness or to support his complaint.

6. Such were the circumstances out of which the Magistrate was called upon to decide as to the guilt or otherwise of Gobind Prasad and his wife u/s 441, Penal

Code, and it is as to the propriety of his determination upon that point, that the case now comes before this Court. I do not forget that I must deal with it, not as I should with an appeal, but simply as a matter for revision u/s 297, Criminal Procedure Code. At the same time it is my duty to see that the Magistrate had before him sufficient legal evidence to justify him in convicting. Applying the tests I have already adverted to in the earlier part of this judgment, I am clearly of opinion that no such possession as is required by Section 441 was ever proved to have been in Ram Ratan Das so as to make Gobind Prasad liable either for his "entering into" or "remaining" on the premises in question. Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved. Evidence of any such intent in this case seems to me to be altogether absent, nor does the complainant himself come forward to establish anything of the kind. Slightly or wrongly, both Kalika and Chaurasi allege a joint interest in the house in Muzaffarganj mahalla, and the former has made formal objection to possession of it being given to Ram Ratan Das. The original mortgage was joint, and of all four houses jointly, the loan was joint, the payment of the Rs. 1,133-8-0 was made on the joint account, and so accepted by the mortgagee, and the agreement of 25th June 1877, was intended to be joint, though it was only executed by Gobind Prasad. Without enumerating other facts in the case, that appear to me to negative any of the intents u/s 441, there is quite sufficient to justify Gobind Prasad in protesting that what he has done has been with the bond fide object of asserting his rights or the rights of his co-sharers. Ram Ratan Das, if he had thought proper to do so, had only to put the machinery of the civil law in motion, and it would have accomplished for him all that he required, but he elected to appeal to the Criminal Courts, and he has no one to blame but himself if he finds that he must now revert to the course of procedure he should have originally adopted. The convictions are quashed.

*Magistrate how to proceed if any dispute Concerning land, &c, is likely to cause breach of the peace.

[Section 530:--Whenever the Magistrate of the District, or a Magistrate of a Division of a District or Magistrate of the 1st class, is satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, or the boundaries of any land, or concerning any houses, water, fisheries, crops or other produce of land, within the limits of his jurisdiction,

Party in possession to be continued until ousted by due course of law.

such Magistrate shall, record a proceedings stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual

possession of the subject of dispute.

Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire and decide which party is in possession of the subject of dispute.

After satisfying himself upon that point, he shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law and forbidding all disturbance of possession until such time.

Explanation....Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information, but the question of possession must be decided on evidence taken before him.]