P. V. Chandran Vs L. V. Krishnamoorthy

Court: High Court Of Kerala

Date of Decision: Sept. 27, 1988

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 195, 313
Penal Code, 1860 (IPC) â€" Section 21, 441, 448, 482, 506

Citation: (1988) 2 KLJ 556

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: K. Kunhirama Menon and P. Ramakrishnan Nair, for the Appellant; P. C. Mohsin, for the Respondent

Final Decision: Dismissed

Judgement

S. Padmanabhan J.

1. The dispute centres round ""Sangham"" theatre at Calicut which belongs to Sahida, Hemalatha is in occupation under a transaction claimed by her

to be a lease, but contended by Sahida to be only a licence. Before the Subordinate Judge. Calicut, Sahida sued Hemalatha in O. S. No. 159 of

1977 for getting possession after terminating the arrangement. On the application of Sahida the respondent, a retired Deputy Collector, was

appointed as receiver. But he was allowed to take only symbolic possession subject to the occupation of Hemalatha. Sahida took up the matter in

C. M. A. No 1 of 1981 before this Court. By judgment dated 2-6-1981, the C. M. Appeal was disposed of holding that Hemalatha is only a

licensee and the receiver is entitled to terminate the licence and take possession. But that was made subject to accounts being settled by the trial

court after hearing both sides and amounts, if any, found due to Hemalatha being paid. Receiver, who was the 5th respondent in the C. M. Appeal,

took possession of the theatre and the premises at 11.30 A. M. on 3-6-1981 and submitted the original Ext-P2 report before the Sub Judge.

Though on the complaint of Hemalatha the police registered a case, it was referred as mistake of fact. Hence the appellant (husband of Hemalatha)

filed C. C. No. 107 of 1981 before the Chief Judicial Magistrate, Calicut against the receiver as first accused and Sahida as second accused for

offences punishable u/s 448 and 506 (ii) I. P. C. Both of them sought to quash the complaint by filing Section 482 petitions before this Court

unsuccessfully Sahida went upto the Supreme Court in special leave. But leave was refused on the undertaking of the complainant that the case

against Sahida will be withdrawn. Accordingly, the case against her was withdrawn and she was discharged. The case proceeded only against the

receiver. He was ultimately acquitted. Present appeal is by the complainant against the acquittal.

2. The allegation in the complaint is that in violation of the provisions of Ext. D2 judgment of this court in C. M. A. No. 1 of 1981, the receiver

made forcible entry, took forcible possession by putting an employee PW 4 to fear of death and snatching away the keys and then went away after

locking the premises. On the merits of the allegation and evidence'' Section 448 was repelled for the reason that even though the action of the

respondent is unauthorised involving civil liability, it will not amount to criminal trespass.

3. Limitations on interference and grounds justifying interference in an appeal against acquittal are now well settled by a host of authoritative judicial

pronounce meats of the Supreme Court and High Courts. It is not necessary to cite authorities. In view of the presumption of innocence'' until the

guilt is established beyond reasonable doubt by the prosecution, which is not weakened but only strengthened by the acquittal, and the exclusive

right of the accused and not the prosecution to get the benefit of all reasonable doubts, and on account of the cardinal rule of criminal jurisprudence

that even at the risk of many guilty persons escaping conviction one innocent man should not be convicted, the courts are bound to accept the view

in favour of the accused in preference to the one in favour of the prosecution, when two equally reasonable views are possible on the evidence.

When such a view was taken by the trial court which had the added advantage of seeing the witnesses in action and watching their demeanour, that

will not be lightly interfered with by the appellate court. But that does not mean that the appellate court has no right to interfere. Right of the

appellate court is the same whether the appeal is against conviction or acquittal. Difference is only in the approach. In order to foreclose the right of

interference the view adopted by the trial court must be one reasonably possible from the evidence. If so possibility of another equally reasonable

view by reappraisal will not justify interference. But when the approach of the trial court is vitiated by some manifest illegality or the conclusions are

against the weight of evidence and not possible by a reasonable and judicious approach and as such capable of being characterised as perverse,

the appellate court'' not only can but must interfere to do justice. The crux of the matter is only that when two reasonable and plausible views are

possible, the one taken by the trial court cannot be substituted by the other by a reappraisal of the evidence by the appellant court.

4. Four witnesses were examined by the appellant including himself as PW 1. He is not an occurrence witness. Among the others, PWs 2 and 4

are the employees of the appellant. They alone have spoken to the criminal intimidation and said that there was threat to cause death. The only

independent witness PW 3 is conspicuously silent in this respect. Ext. P6 complaint by Hemalatha to the police and Ext. P7 F. I. R. registered on

its basis are also silent in this aspect. Acquittal for the offence u/s 506 (ii) is the reasonable one in the circumstances. It cannot be interfered.

5. Before considering the offence under sec. 448, it is advantageous to consider the conduct of the respondent who ought to have acted as an

impartial agency. The fact that he took possession at 11.30 AM on 3-6-1981 and locked the premises is clear from Ext. P2 report submitted by

him. Such taking possession was forcible and against the resistance of PW 4 is also clear from the evidence of PWs 2 to 4 It was a running theatre

when the respondent took forcible possession. He locked the theatre and went underground as seen from Ext. P3 order passed by the Sub Judge

on I.A. No. 1964 of 1981 filed by Hemalatha on 5.6 1981 complaining of unauthorised taking possess on by the receiver. The court was

constrained to order publication against him since he was not available at his residence and his family members were in the dark as to where he is

even though a special messenger was sent. He appeared only when Hemalatha filed C.M.P. No. 9760 of 1991 before this court in C. M. A. No.

1 of 1981. Through his counsel he regretted for the wrong done and contended that he was misled by the penultimate para of Ext. D2 Judgment.

That explanation was not considered, but his action was found to be unauthorised. He was directed by Ext. P4 order to surrender possession to

Hemalatha. Possession was surrendered OD 20-6-1981. By his calculated unauthorised act, he was able to keep Hemalatha out of possession

from 3.6.1981 to 20.6.1981 and suffer humiliation and loss of income. He is definitely answerable to Hemalatha in this respect and she is having

the right to proceed against him personally.

6. But in this case, when questioned u/s 313 Crl. P. C. the respondent ignored Ext. P2 and the submission made by him when passing Ext.P4

order that he took possession only on 3-6-1981 pursuant to Ext.D2 judgment. For the purpose of escaping liability, he said that he took

possession as early as 1973 pursuant to the order of the Sub Judge appointing receiver and entrusted the theatre to Hemalatha. That shows he has

no respect for truth and his conscience is so elastic as is capable of being stretched to any extent when a need comes. Normally a receiver has to

take possession only when he is served with a direction for that purpose from court. In this case, he alone knows why without such a written

direction and even before the judgment was typed, signed and communicated he thought of taking possession.

7. Ext. D2 order shows that C. M. A. No. 1 of 1981 was heard by a Division Bench of this court on 2-6-1981 and the judgment was dictated

from the Bench on the same day. The judgment covers full 16 typed pages. The judgment could not have been transcribed, corrected and signed

on the same day Respondent has no case that he was present in court when the judgment was dictated. Normally that is not probable also because

he was not and he need not be a contesting party in a matter where he is only a formal party and the contest was between Hemalatha and Sahida

to retain possession or get possession. The judgment specifically provided that the receiver could take possession only as per directions of the trial

court after hearing parties and settling accounts and payment of amount if any, due to Hemalatha. For that purpose the judgment should reach the

trial court and parties should be heard and orders passed. If the receiver was present in court, there is no question of himself being misled by the

penultimate para of the judgment. If he was not present he could have taken possession only on seeing the judgment. He has not disclosed As to

how he got information about the judgment. Judgment was pronounced at Ernakulam on 2-6-1981 and possession was taken at Calicut at 11.30

AM on 3-6-1981. It is clear that he knowingly misused his position and consciously flouted the judgment of this Court. That must have been either

at the instance of Sahida to help her or actuated by the desire to make gain for himself as the receiver. Anyway he made himself unfit to bold any

responsible position of confidence and brought insult to the office which he held. He made himself very cheap also. That he was not acting to the

interest of the estate is clear from the fact that without making arrangements to run the show he closed and locked the theatre and went

underground to avoid the possibility of arrangements for possession being made by court. If he is continuing as receiver, it is for the Subordinate

Judge to take steps to remove him from the position and see that he is not inducted into any position of responsibility. It is not known why such

fortune hunters are appointed as receivers when honest persons are available.

8. But the real question is whether the unauthorised and malafide act of the respondent will amount to criminal trespass, in which case the acquittal

could be interfered. I was not able to find any force in the contention that prosecution is not maintainable without leave of the court which

appointed the respondent as receiver. So also there is no merit in saying that a licensee has no exclusive possession and hence the action will not

he. It was also pointed out that prosecution could be only by or at the instance of the court which appointed him and if at all there is any liability it

could only be for contempt of court and nothing else.

9. It is true that in order to constitute criminal trespass as defined in Section441 I. P. C. the entry must be upon the property in the possession of

another. The claim of possession must be exclusive and it involves an intent to exclude other persons from the use of the thing possessed a mere

interest or claim of an unexclusive possession is not sufficient. A licensee is not having exclusive possession but only a right to use for a particular

purpose. But the exclusion need not be absolute: Here what is involved is a theatre It was under the lock and key of Hemalatha and in her

exclusive occupation even though Sahida was entitled to terminate the licence and come into possession. Even though the arrangement was held to

be a licence, Ext. D2 and Ext. P4 clearly say that Hemalatha was in possession and physical possession was to be resumed from her after settling

accounts paying the amount, if any, due to her. The criminal court while trying an offence as defined in Section441 I. P. C. is not very much

concerned with the subtle distinctions between a lease and a licence or the rights and liabilities as between a lessee and lessor and licensee or

licensor. It is concerned only the question whether entry was in the property in the possession of another, who is entitled to resist or oust a

trespasser, whatever may be the position otherwise, if the entry was by the licensor. In this case the possession of Hemalatha and the right to

dispossess her are concluded by Exts. D2 and P4. It is true that in order to sustain a prosecution for criminal trespass the ingredients of Section

441 I. P. C. must be established. Therefore, in spite of the finding that the arrangement is only a licence, the provisions of Exts. D2 and P4 show

that entry could be criminal trespass provided the other ingredients of Section441 I. P. C. are satisfied.

10. It is settled law that proceedings taken in respect of a property which is in the possession and management of a receiver appointed by court

under Order 40 Rule 1 C. P. C. must be with the leave of court which appointed the receiver. Otherwise it will be contempt of the authority of the

court" That is quite so in respect of any action, civil or criminal, against the receiver as such also. The general rule that property in custodia legis

thought its duly appointed receiver is exempt from judicial process except to the extent that the leave of the court has been obtained, is based on a

very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different courts (Kanhaiyalal Vs. D.R. Banaji

and Others,). Receiver is an officer of the court and he is a public servant coming within the fourth clause of the definition in Section 21 I. P. C. It

is the duty of the court which appointed him to see that in the discharge of his official functions he is not subjected to unnecessary harassment by

civil litigations or criminal prosecutions which will also burden the estate with expenses and affect the return that has to go to the successful party.

That may affect the image and authority of the court also. That is why in the absence of any statutory provision, judge made law provided that

whenever anyone wants to proceed against the receiver for what has done or purported to have done in the discharge of his official duties, the

court which appointed him has to be informed and leave taken. It is for the court to assess the materials to decide whether the litigation or

prosecution has to be given leave Normally leave, will be g-anted. But without leave the proceedings will not lie.

11. But the bar is not applicable to all the actions of the receiver. If the action is unconnected with the functions or purported functions of the

receiver no question of leave of court will arise. If the receiver exceeds his authority and does something which cannot be claimed to be atleast

under the purported authority of his office, an action against him cannot be challenged for want of leave from court. In this case, the receiver

flagrantly violated the directions of this court in taking possession. He is not protected in that respect and cannot resist the prosecution on the

ground of want of sanction. An unauthorised act or a crime cannot be said to be under the purported authority of the office and leave of court is

not necessary for prosecuting the receiver. So also, there is no point in saying that when the receiver violates an order of court and commits a

crime he commits only contempt of court and any action against him could only be by the court, This is not a case coming u/s 195 of the Cr. P.C.

12. In order to constitute criminal trespass the entry must be with the requisite mens rea. It must be with intent to commit an offence or to

intimidate, insult or annoy the person in possession. Use of criminal force or even the presence of the possessor at the time of the entry are not

necessary to constitute those ingredients. Entry under a bona fide claim of right, however ill-founded in law the claim may be, will not become

criminal merely because a foreseen consequence of the entry is annoyance to the occupant (K. G. Varghese V. Annamma Mariamma and others

1967 KLT 497). It is necessary for the court to be satisfied that causing annoyance, intimidation or insult was the aim of the entry. It is not

sufficient to show merely that annoyance, intimidation or insult was the natural or likely consequence of entry known to the person entering. In

considering the aim or intention of the entry which constitutes, the mens rea to make it the offence the court has to consider all the relevant

circumstances including the presence of the knowledge of the consequences. Intention being a state of mind has to be inferred from the facts

proved or admitted. The proposition that every person intends the natural consequences of his act is often a convenient and helpful rule to ascertain

the intention, though it is not applicable in all cases and under all circumstances The general guideline is the answer to the question whether the

accused entered into possession with the dominant intention to intimidate, insult or annoy.

13. "Claim of right" does not refer to actual legal right. It means belief in legal right. It can stem from a mistake of law or mistake of fact or both.

Such mistakes, if bona fide, will exclude mens rea. Only thing is that the mistake must be one which leads the accused to claim that he has a right to

act as he does (Pappu v. Damodaran- 1967 K. L. T. 918). The intention mentioned in Section 441 I. P. C. is the main intention of entry and not

subsidiary intention that may also be present (Mathuri and Others Vs. State of Punjab,). In deciding the intention it is futile to know whether the

accused had proved his right or title to the property (Paras Ram v. State- 1912 Cri. L. J. 1093). But by the expressions ""claim of right"" or ""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. 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 (Chandi Kumar Das

Karmarkar and Another Vs. Abanidhar Roy,). This is an appeal against acquittal. The Chief Judicial Magistrate has considered the evidence and

gathered the impression that the respondent only exceeded his authority under Ext. D2 entailing civil consequences, but the requisite mens rea is

absent. Even though I do not have much agreement with that view and the further view of the Chief Judicial Magistrate that what is involved is only

a technicality, I may not be justified in substituting my views rejecting the impression of the Chief Judicial Magistrate who had the added advantage

of personal perception. Respondent was the receiver appointed long ago and there is atleast one per cent possibility of himself acting without the

requisite mens rea under a purported claim of right as receiver. No action has been taken against him by the court. In order to constitute mens rea

it is not enough to show that he acted in derogation of the directions of court for which he may be answerable to the court. The dominant intention

of the entry must be shown as causing insult, intimidation or annoyance. I do not think that I may be justified in so presuming even though I am fully

satisfied that in all probability the respondent was only misusing his official position consciously with some ulterior motive. From that I cannot

conclude without doubt that the dominant intention was insult, intimidation or annoyance to the possessor even though the intention may be to help

Sahida or help himself. Therefore, I am not inclined to find that an offence u/s 448 is made out, The acquittal has only to be confirmed, though for

different reasons and only on the basis of" benefit of doubt.

The criminal appeal is dismissed.