

## Hrushu Sahu Vs The State of Orissa and Another

**Court:** Orissa High Court

**Date of Decision:** Dec. 15, 1970

**Acts Referred:** Penal Code, 1860 (IPC) â€” Section 294, 323, 352, 425, 447

**Citation:** (1971) 37 CLT 159

**Hon'ble Judges:** B.K. Patra, J

**Bench:** Single Bench

**Advocate:** A.K. Padhi, for the Appellant; Standing Counsel, for the Respondent

**Final Decision:** Allowed

### Judgement

B.K. Patra, J.

The Petitioner has filed this application to revise the appellate order of the Additional Sessions Judge, Cuttack maintaining

his conviction u/s 323, Indian Penal Code and the fine of Rs. 50/- imposed therefore. The Petitioner Hrushu Sahu and the father of the complainant

Bharat Sahu were brothers. They had partitioned their properties and each was in separate possession of his share. A piece of land situated in

front of their house and which was being used as a common passage was however left undivided. On the date of occurrence, some labourers

employed by the complainant were digging some pits in this passage when Laxmidhar, the son of the Petitioner came to the post, and prohibited

the labourers from doing so. On hearing the protest, the complainant came out of the house when, it is alleged the Petitioner's son abused him.

In the mean time, the Petitioner came to the spot and he is alleged to have given a slap to the complainant on his left forehead. The complainant

thereupon filed a complaint petition against the Petitioner and his son for offences under Sections 352, 294 and 447, Indian Penal Code and further

against the Petitioner alone u/s 323, Indian Penal Code. The trial Court acquitted the Petitioner and his son of the charges under Sections 352 and

294, Indian Penal Code but convicted them u/s 447, Indian Penal Code on the finding that the passage in question was the exclusive property of

the complainant and that the Petitioner and his son had no right thereto, and sentenced each of them to pay a fine of Rs. 60/-, in default, to

undergo rigorous imprisonment for one month. He further convicted the Petitioner u/s 323, Indian Penal Code and sentenced him to pay a fine of

Rs. 50/-, in default, to undergo rigorous imprisonment for 15 days. On appeal, the learned Additional Sessions Judge have a somewhat confused

finding regarding the title to the disputed passage. He found:

The disputed land being small and vacant having no demarcation or distinguishing marks from the passage of the complainant with that of the

accused persons and the same being more or less the frontage of both parties, it can be visualised as to how this can be made workable....

It is in such light that the matter has to be appreciated and my view is that the objection by the accused persons was not to allow any such

construction on the disputed passage which was advantageous to both sides even if the title might be with the complainant though there is no such

positive evidence. This leads to an irresistible conclusion that the accused persons were asserting their bona fide right of keeping the disputed

passage vacant and that is why previously they had objected when the Bun-shade was constructed by the complainant and also at the time of

occurrence when pillars were about to be posted by digging earth.

The learned Judge concluded with the finding that:

the accused persons are entitled to the benefit of doubt as the complainant cannot be said to have proved to the hilt about his exclusive possession

over the disputed land so as to turn a passage into a residential place.

He, therefore, acquitted the Petitioner and his son of the charge u/s 447, Indian Penal Code. In regard to the charge u/s 323, Indian Penal Code

against the Petitioner, however, he believed the prosecution case that the Petitioner gave a slap to the complainant and dismissed the Petitioner's

plea that he was entitled to do so in exercise of his right of private defense of property and maintained his conviction under that charge.

2. It is clear from the finding of the learned Additional Sessions Judge that in whomsoever the title to the disputed passage vested, that passage

was in joint enjoyment of the Petitioner and his nephew the complainant. It was also found that on the date of occurrence, the Petitioner was

getting the passage dug at place to put up pillars with a view to make it a part of his residential house. There was protest by the Petitioner and

counter protest by the complainant in the course of which the Petitioner gave a slap to the complainant. The question is whether in the

circumstances stated above, a right of private defence of property was available to the Petitioner.

3. When, as has been found, the passage was in the joint possession of both the parties, the digging of holes thereon with a view to put up pillars in

order to make it a part of the residential house by the complainant, is clearly an act which would diminish the utility of the land as a passage and

would amount to mischief within the meaning of Section 425, Indian Penal Code. That being so, the Petitioner had every right to prevent the

digging. Section 97 of the Penal Code, gives the right of private defence of property against an act which amounts *inter alia* to an offence of

mischief. In this view of the matter, the Petitioner must be held to have acted in exercise of his right of private defence of property. In exercise of

such right, the Petitioner gave only a slap to the complainant and it is not contended on behalf of the opposite parties that if the Petitioner had any

right of private defence he had in any manner exceeded it.

4. In the result, I would allow this application, set aside the conviction of the Petitioner and the sentence imposed on him and direct that the fine, if

paid, be refunded.