
Savani Transport Ltd. and Another Vs Kamraju Bisoi

Criminal Miscellaneous Case No. 327 of 1990

Court: Orissa High Court

Date of Decision: Sept. 11, 1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) " Section 200, 202, 482#Penal Code, 1860 (IPC) " Section 441, 448#Transfer of Property Act, 1882 " Section 116

Citation: (1991) 71 CLT 40 : (1991) CriLJ 1073

Hon'ble Judges: L. Rath, J

Bench: Single Bench

Advocate: Y.S.N. Murty and S.S. Rao, for the Appellant; S.D. Das, for the Respondent

Final Decision: Allowed

Judgement

L. Rath, J.

The S. D. J. M., Berhampur having taken cognizance against the petitioners u/s 448 I.P.C. on a complaint filed by the opposite

party, the petitioners have invoked the inherent powers of this Court to quash the cognizance taken as well as the proceeding against them. The

admitted facts are that the petitioner No. 1 took the shop house of the opposite party on rent in pursuance of a rent deed executed on 5-7-86. At

the time the deed was executed one Mr. M. V. Prasad through whom the petitioner No. 1 is represented as per the complaint petition was the

Branch Manager but he has since been transferred and the petitioner No. 2 has taken over charge as the Branch Manager. As per the agreement

the tenancy was to expire on 5-6-89, but prior to that on 1-5-89 the opposite party gave a notice to petitioner No. 2 to vacate the premises by 5-

6-89. A reply was sent by the petitioners" advocate to the opposite party on 19-5-89 stating that the notice was not legal, that it was not possible

for his client to vacate the premises within the short period and that his client preferred to occupy the house paying rent as usual. On 9-6-89 the

advocate for the petitioners sent a further reply to the opposite party by way of a rejoinder requesting him to desist from illegal and forcible acts

and informing him that if he chose to resort to speculative litigation, it would be at his risk and that the rent of the house should be reduced to Rs.

400/- per month. Thereafter the opposite party's advocate sent a letter to the advocate for the petitioners on 15-9-89 requesting that he should

instruct his client to vacate the premises within fifteen days of receipt of the notice. On 27-9-89 a reply was sent by the advocate for the petitioners

to his counterpart that action as threatened might be taken in the court of law which was welcome and that correspondence in the matter might be

set at rest. The opposite party thereafter filed the complaint on 6-11-89 alleging the petitioners to have committed criminal trespass over his

property punishable u/s 448 I.P.C. The learned Magistrate after examining the complainant u/s 200 Cr. P.C. and recording the statements of

witnesses u/s 202 Cr. P.C. as also perusing the documents was of the view that there was sufficient ground to proceed against the petitioners in

view of the Orissa Amendment to Section 441 I.P.C. by Orissa Act 22/ 86 and hence took cognizance of the case.

2. Mr. Y.S. N. Murty, learned counsel appearing for the petitioners, has urged :--

(1) That the dispute between the parties is one of civil nature for which no criminal case is maintainable.

(2) Since Shri M. V. Prasad was only an officer of M/s Savani Transport Ltd. and has been, as appears from the complaint petition, transferred

from the Branch before expiry of the lease, he could not be made to represent M/s Savani Transport Ltd. and cannot be criminally proceeded

against.

(3) Since the opposite party has accepted rent for the premises till April, 1990 but has refused on 7-6-90 to receive the rent for the "" month of

May, 1990, a fact which has been averred by the petitioners in an affidavit filed in this Court, it must be held that the petitioners are, u/s 116 of the

T.P. Act, tenants holding over and hence the tenancy is to continue after issue of notice on 1-5-89 and the subsequent notices, for which the

petitioners' possession cannot be said to be unauthorised which is the requisite foundation for initiation of a criminal prosecution u/s 448 I.P.C.

(4) So far as the Orissa Amendment to Section 441 I.P.C. is concerned, only the third part thereof is relevant for the present case, but since that

part provides that before a criminal action is initiated a notice in writing is necessary calling upon the person concerned to vacate and only on his

failure to do so he can be said to have committed criminal trespass, the proceeding does not lie as the notice of 1-5-89 was premature and that on

or after 5-6-89 no notice has been given to the petitioners.

3. The core question that falls for consideration in this case is the interpretation of the Orissa Amendment to Section 441 I.P.C. defining criminal

trespass, which when committed in respect of, inter alia, a human dwelling, becomes an offence u/s 448 I.P.C. It is the consensus of the learned

counsel for the parties that ordinarily a dispute between a tenant and landlord regarding vacation of a premises after the tenancy is over is a civil

dispute and that unless an offence of criminal trespass can be said to have been committed by invoking the provisions of the Orissa Amendment,

the criminal prosecution of the petitioners would not lie. It is for such reason that I would take up such question first. For an appreciation of the

submissions raised, Section 441 I.P.C. as it stands substituted by the Orissa Act 22/86 may be usefully extracted :--

Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in

possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult

or annoy any such person or with intent to commit an offence,

or having lawfully entered into or upon such property, remains there with the intention of taking unauthorised possession or making unauthorised

use of such property and 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 on him, is said to commit criminal trespass.

4. The substituted section consists of three parts. So far as the first part is concerned the intention to commit the offence is paramount so that the

person concerned must have entered upon the property of another with intent to commit an offence or to intimidate, insult or annoy any person in

possession of the property. This part has no application to the present case as the petitioners had lawfully entered the premises and have been in

possession of the same. The initial entry being lawful, this part of the section does not create any offence so far as the petitioners are concerned.

5. So far as the second part is concerned, the primary aspect of the provision is also intention. It stipulates that if one has lawfully entered into or

upon the property but unlawfully remains there with intent to intimidate, insult or annoy any person or with intent to commit an offence, he would be

guilty of criminal trespass. The provision applies to cases where the initial entry may be lawful but continuance in the premises subsequently

becomes unlawful and the offence is committed if the person remains thereon unlawfully for any of the purposes enumerated in this part. This clause

has also no application since it is not the case that the petitioners have unlawfully continued in the premises with any of the intents as enumerated in

this part.

6. The third part requires that if a person has lawfully entered the premises and remains there with the intention of:--

(i) taking unauthorised possession; or

(ii) making unauthorised use of such property; and

(iii) fails to withdraw from such property or its possession or use when called upon to do so by notice in writing duly served on him, he commits the offence.

The ingredients of this part are that the entry at the first place must be lawful but the continuance to remain on the premises must be with the

intention of taking unauthorised possession or making unauthorised use of it, and failing to withdraw in spite of a notice. Hence, both the conditions

must be satisfied to attract the provision, i.e. the continuance in the premises must be with the intention of taking unauthorised possession or making

unauthorised use of it even though such intention was not there in the beginning at the time of the entry and, secondly, a notice given to withdraw

from the property or its possession or use is not complied with. This part of the section thus takes care of the situations where a person's original

intention might not have been to continue in occupation of the property unauthorisedly or to put it to unauthorised use but having entered, develops

the intention later on and continues in the premises in pursuance of such intention but the offence under this part is not committed until a notice in

writing has been given to the person to vacate the premises and he has disregarded it.

7. As the foregoing analysis would show, this part of the section would apply to the possession of a tenant whose tenancy has been terminated.

The original intention of the tenant might not be to commit an offence, yet the moment his tenancy is terminated and he is asked to vacate, his

possession becomes unauthorised and his use thereof also becomes unauthorised. Once the possession becomes unauthorised, if the tenant

develops the intention of continuing in such possession or making such use, the mischief is committed provided a notice is given calling upon him to

vacate the premises and he does not obey. This presupposes that the landlord or the person entitled to possession has the authority to declare the

possession of the tenant unauthorised which authority would be lacking if there is any statutory protection to the tenants from eviction as was

provided in the Orissa House Rent Control Act.

8. In this background of law, it is to be seen as to how far the criminal case initiated by the opposite party is maintainable. It has been seen that no

offence under this part of the section can be said to have been committed until the requisite notice has been given and the same has been failed to

be complied with. The question is when such notice is to be given and to whom. Obviously the two provisions of the third part of the section

cannot have simultaneous operation and one must follow the other. A person who has lawfully entered the premises may develop an intention to

take unauthorised possession of the premises even before his right to lawfully continue in the premises ceases. Similarly, even while the person is

lawfully continuing in the premises, yet he may develop the intention to put the same to an unauthorised use. But mere nourishing of such intentions

cannot be an offence in itself unless the intention has become manifest in some overt act from which it can be inferred that the person concerned

has developed the intention of taking unauthorised possession of the property or to put it to unauthorised use. Once such intention becomes

manifest, the notice has to be given asking him to withdraw from the property or its possession or use. There cannot be any occasion to issue the

notice unless the person entitled to give the notice has become aware of the wrongful intention. Thus where a tenancy has come to an end and a

tenant has been asked to vacate, but he does not do so, he expresses an intention to continue in possession which is not authorised and to put the

premises to use which is not authorised. Once such intention is expressed and is gathered, a notice under the third part of the section becomes

necessary calling upon the person concerned to vacate which notice, if not honoured, the ingredients of the section would have been satisfied to

launch a prosecution.

9. Similar conclusions as have been reached by me were also reached by the Allahabad High Court while considering the U.P. Amendment to

Section 441 I.P.C. in D.P. Titus Vs. L.W. Lyall, cited by Mr. Das, learned counsel for the opposite party though the section is slightly different

from the Orissa Amendment. It was held that under the U.P. Amendment, where the entry is lawful but is alleged to have become subsequently a

criminal trespass, it was necessary to show that the continuance in the premises was with the intention of taking unauthorised possession or making

unauthorised use of the property and that the occupant failed to quit on written notice to do so. The provision does not apply where the

continuance of the occupant in possession is in assertion of his own right.

10. Mr. Murty, learned counsel for the petitioners, also relied upon Kanwal Sood Vs. Nawal Kishore and Another, which was a decision on

interpretation of the same U.P. Amendment to Section 441 I.P.C. It was a case, the Court held, where the accused might be thinking that she had

a right to occupy the premises even after the death of the original owner and if a suit for eviction would be filed in the civil court, she might be in a

position to vindicate her right and justify her possession. This was essentially a civil matter which could be properly adjudicated upon by a

competent civil court and a criminal prosecution would not lie. In the context, the Supreme Court observed that in order to satisfy the conditions of

Section 441 it must be established that the accused entered in possession over the premises with intent to commit an offence.

The U.P. Amendment to Section 441, as a matter of fact, lays stress upon such intention in all the three parts of it. Thus, under that provision if

anyone enters into possession of a property with the intention to commit an offence or to intimidate, insult or annoy any person in possession of that

property, or any person having lawfully entered upon the premises unlawfully remains there with the intention thereby to intimidate, insult or annoy

any person or with the intention to commit an offence, or having entered into or upon the property either before or after the Criminal Law

Amendment Act, 1961 (U.P. Amendment) with the intention of taking unauthorised possession or making unauthorised use of the property fails to

withdraw from the property in spite of notice is said to commit the offence. Hence, both the first and third parts of the section require the original

intention itself to be wrongful in the manner specified in both the parts. The third part of the Orissa Amendment and the third part of the U.P.

Amendment are in such respect different from each other, inasmuch as so far as the U.P. Amendment is concerned, the intention is necessary to be

originally there, whereas in the Orissa Amendment the intention to unauthorisedly possess or to put the property to unauthorised use is to develop

after the lawful entry. This decision is therefore of no help to the petitioners' cause.

11. Next to be considered is to whom the notice is to be given. As the section stands, the notice must be given personally to the person concerned

and must be duly served upon him. The notice must also be in writing. Admittedly no such personal notice has been given to the petitioners but only

some notices have been issued or correspondences have been made with their advocate. What is content plated under the third part is not notice

to the advocate, but notice to the person concerned, Non-compliance with the notice exposes a man to criminal liability and hence the provisions

of the notice must be strictly construed. An advocate may fail to duly notify his client of the notice but for that the person concerned cannot be

made criminally liable. Hence, unless such a notice is given, a proceeding u/s 448 I.P.C. would not lie.

12. Admittedly no such notice had been given to the petitioners after they have expressed the intention to unauthorisedly continue on the premises

for which the proceeding has become liable to be quashed.

13. So far as the second submission of Mr. Murty is concerned, I find myself in agreement with the same. Since it is the very case of the opposite

party in the complaint petition that Mr. M. V. Prasad was only a Branch Manager of the Transport Company, holding the office during the time the

agreement was executed but has long since been transferred even before the lease period expired, he could not be said to have any criminal liability

at all for continuance of the transport company in the opposite party's premises. The petitioner No. 1 was thus to be represented by the present

Branch Manager who has stepped into the shoes of Mr. Prasad and hence there cannot be any hesitation to quash the proceeding as against him.

14. The submission regarding the petitioners being tenants holding over is a disputed question of fact since mere acceptance of rent may not always

create a tenancy by holding over. The opposite party has admittedly been opposing the continuance of the petitioners in the premises and hence if

under that circumstance rent is accepted, its effect upon the tenancy is not a question which can be gone into before this Court in a petition u/s 482

Cr. P.C. and as such I would desist from expressing any opinion on the same.

15. In the result, the petition succeeds and the cognizance taken against the petitioners in I.C.C. Case No. 59/89 by the S. D. J. M. Berhampur as

also the proceedings are quashed.