

Smt. Kanwal Sood

Vs

Nawal Kishore and Another

Criminal Appeal No. 69 of 1981

(D. A. Desai. R. B. Misra JJ)

26.11.1982

JUDGMENT

MISRA, J. –

1. The present appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad, dated December 16, 1980, convicting the appellant under Section 448 of the Indian Penal Code.
2. Premises Aranya Kutir bearing Municipal No. 47A Jakhan in Dehra Dun was owned by one R. C. Sood. He executed a gift-deed in favour of Shri Anandmayee Sangh, Dehra Dun with the stipulation that the donor shall remain in possession of the premises during his lifetime and after his death his widow if alive would remain in possession. The management of the same would be taken up by the Sangh after their death.
3. The appellant is the widow of the brother of Shri R. C. Sood. It appears that in 1967 the petitioner was invited by Shri R. C. Sood to reside with him in the aforesaid house and ever since she has been residing peacefully there. On October 10, 1973 Shri R. C. Sood expired. The appellant, however, continued to live in the said house.
4. Respondent 1, Shri Nawal Kishore as Secretary of the aforesaid Sangh served a notice dated November 13, 1973 on the appellant asking her to vacate the premises in dispute immediately, k failing which a criminal action under Section 448 of the Indian Penal Code would be taken against her as her further stay in the premises would be deemed to be in the nature of a criminal trespass. The appellant, however, did not vacate the premises as she was convinced that her stay in the said premises could not amount to criminal trespass.
5. Respondent 1, Shri Nawal Kishore thereupon filed a complaint under Section 448 of the Indian Penal Code against the appellant in the Court of Sub-Divisional Magistrate, Mussoorie. He examined himself as PW 1 and also produced Shri K. Bose as PW 2.
6. The appellant in her statement under Section 313, as well as in her statement as a witness DW 1 admitted the service of notice on her but denied that any criminal action was called for. She further stated that she had met Anandmayee who had permitted her to live in the house.
7. The learned Magistrate, however, took the view that the premises in dispute has been vested in the Anandmayee Sangh by virtue of the gift-deed and a notice to vacate having been served upon the appellant, the continued stay of the appellant in the said premises amounted to a criminal

trespass within the meaning of Section 441 of the Indian Penal Code and sentenced her to pay a fine of Rs 100 and in default to undergo simple imprisonment for 40 days. In addition the learned Magistrate also passed an order directing the appellant to vacate the premises within two months of the passing of the order, purporting to be one under Section 456 of the Criminal Procedure Code.

8. The appellant feeling aggrieved by the order of the learned Magistrate went up in appeal and took up various grounds. The learned Sessions Judge allowed the appeal, set aside the order of the learned Magistrate and acquitted the appellant by his judgment dated August 19, 1975. Respondent 1 Shri Nawal Kishore assailed the order of acquittal by filing a criminal appeal in the High Court and the High Court in its turn allowed the appeal and reversed the order of acquittal passed by the learned Sessions Judge and convicted the appellant. In the opinion of the High Court the appeal filed by the appellant before the Session Judge was incompetent as no appeal could lie against the imposition of fine. It also took the view that under the provisions of Section 401 (5) of the Criminal Procedure Code it is permissible to treat a revision as an appeal but not vice versa. It therefore, declined to treat the appeal against the order of Magistrate as a revision. The High Court further expressed the opinion that the appellant may file a revision if she so chooses which would be considered by the Court of Admission and then if proper the same may be allowed. The appellant feeling aggrieved by the judgment of the High Court has filed the present appeal with the special leave as stated earlier.

9. Shri Soli J. Sorabji appearing for the appellant has contended that on the allegations made in the complaint no offence under Section 441 of the Indian Penal Code is made out. In order to appreciate the contention it will be appropriate at this stage to read Section 441 of the Indian Penal Code :

441. Criminal trespass. - Whoever enters into or upon property in the 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, is said to commit "criminal trespass".

There has been local amendment by U. P. Act 31 of 1961; for Section 441 of the Indian Penal Code, 1860, the following shall be substituted :

441. Criminal trespass.- 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 in possession of such property, whether before or after the coming into force of the Criminal Law (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'.

10. It may be pointed out that the appellant was allowed to occupy the premises in 1967 by Shri R. C. Sood. Under the terms of gift-deed Shri Sood was entitled to remain in occupation of the premises during his lifetime. He could as well grant, leave and licence to the appellant to occupy the premises along with him. Now the question arises about her status after the death of Shri R. C. Sood. At the most, it can be said that after the death of Shri Sood the leave and licence granted by

Shri Sood came to an end and if she stayed in the premises after the death of Shri Sood, her possession may be that of a trespasser but every; trespass does not amount to criminal trespass within the meaning of Section 441 of the Indian Penal Code. In order to satisfy the conditions of Section 441 it must be established that the appellant entered in possession over the premises with intent to commit an offence. A bare perusal of the complaint filed by respondent 1 makes it abundantly clear that there is absolutely no allegation about the intention of the appellant to commit any offence or to intimidate, insult or annoy any person in possession, as will be evident from three material paragraphs which are quoted below :

2. That the late Shri R. C. Sood was occupying the said premises in accordance with clause 1 of a gift-deed executed by him in favour of Shri Anandmayee Sangh and after his demise the said premises had to be delivered to Shri Anandmayee Sangh.

3. That after the demise of Shri R. C. Sood, the accused was repeatedly requested to voluntarily vacate and deliver the possession of the said premises to the Sangh but the accused paid no heed and hence a notice dated November 13, 1973, copy of which enclosed, was sent to the accused as required by U. P. Amendment of Section 448 [sic Section 441], IPC. The said notice was served upon accused on November 14, 1973 as per postal A. D. receipt attached herewith.

4. That the accused was required to quit and vacate the said premises by November 20, 1973 but instead of vacating the premises the accused has been making unusual pretext and has thus committed an offence under Section 448, IPC.

11. The appellant may be fondly thinking that she had a right to occupy the premises even after the death of Shri R. C. Sood. If a suit for eviction is filed in the civil court she might be in a position to vindicate her right and justify her possession. This is essentially a civil matter which could be properly adjudicated upon by a competent civil court. To initiate criminal proceedings in the circumstances appears to be only an abuse of the process of the court.

12. We also do not agree with the view taken by the court that the appeal filed by the appellant before the Sessions Judge was incompetent. If the learned Magistrate had only awarded a sentence of fine, in that case rescission alone would be competent and not an appeal but in the instant case the Magistrate not only awarded the fine of Rs. 100 but also directed the appellant to vacate the premises within the two months from the date of the order. This part of the order presumably was passed under Section 456 of the Criminal Procedure Code, and this made the order appealable and the High Court has gone wrong in holding that appeal filed by the appellant before the Sessions Judge was not maintainable.

13. There were certain other pleas taken by the respondents before the High Court but it is not necessary to refer to those pleas in the view that we have taken that on the complaint itself no offence under Section 448 of the Indian Penal Code is made out.

14. For the foregoing discussion, the appeal must succeed. It is accordingly allowed. The judgment of the High Court dated December 16, 1980 is set aside and that of the Court of Session is restored. The bail bond if any shall be cancelled.

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