

# ALLAHABAD HIGH COURT

Emperor

Vs

Motilal Through Kanhaiya Lal

(Mears, C.J.)

27.04.1925

## JUDGMENT

### **Mears, C.J.**

1. One Moti Lal has applied in revision to this Court against his conviction and sentence by a first class Magistrate the conviction and sentence were upheld by the learned Sessions Judge of Cawnpore on appeal. Moti Lal was convicted of the offence under Section 448 of the Indian Penal Code, and the contention of his learned Counsel is that on the facts found by the Courts below, the conviction cannot be supported. The facts are briefly these : One Mt. Basanti was in possession of her husband's property which consisted inter alia, of some shops. On the death of the lady, there were two claimants to the property-one Kanhaiya Lal, a cousin of her late husband, and the other the applicant before this Court. He claimed to be an adopted son. The property immediately in question was a shop which was in the occupancy of a tenant, Yusuf. Both Kanhaiya Lal and Moti Lal appeared as witnesses in support of Yusuf's defence. The defence failed and Kanhaiya Lal got a decree. Subsequently there was another suit for rent by Kanhaiya Lal which was again successful. Yusuf, thereafter gave a notice to Kanhaiya Lal of his intention to vacate the premises and eventually left them on the 2nd of October, 1924. The same day, and before Kanhaiya Lal had been able to take possession of the shop Moti Lal occupied it and locked it up. On these facts the learned Magistrate and the learned Sessions Judge were of opinion that an offence under Section 448 of the Indian Penal Code had been committed. The learned Sessions Judge, from certain other circumstances, namely, that Moti Lal was trying to induce the tenants to pay rent to him by offering to accept one-half of the ordinary rent, and the fact that Moti Lal did not attempt to obtain a declaration from the Court that he was an adopted son of the deceased, came to the conclusion that Moti Lal's object in locking up the shop "must obviously have been to annoy Kanhaiya Lal, the rightful owner."

2. In this Court the learned Counsel for Moti Lal has urged two points : (1) That the house was not in the possession of Kanhaiya Lal within the meaning of Section 441 of the Indian Penal Code, and (2) that the intention of Moti Lal was only to assert his own title and right to

possession and that it was not his intention to annoy Kanhaiya Lal.

3. If, therefore, the applicant is right on either of these points, he is entitled to have the conviction set aside. Section 441, as far as material, is as follows : "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 is said to commit criminal trespass."

4. First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as for instance, the actual owner, his wife, servant, agent, licensee or other person, They are at all events results which more naturally follow when premises are occupied than when vacant. The point as to actual possession being essential is not a new one, and indeed there is direct authority upon it the earliest case on the point to which our attention has been called is that of *King-Emperor v. Govind Prasad* (1879) 2 All. 465. On the facts of the case it was abundantly clear that there could be no; successful prosecution of criminal trespass. But the law was discussed by Straight, J. and he expressed his deliberate opinion that possession must be "actual in the sense and meaning of Section 530 of the Criminal Procedure Code." Section 530 of the Criminal Procedure Code of 1872, related to maintenance of possession in case of apprehended breach of peace. The person who was in actual occupancy of a property, whether he has any title in him or not, is to be maintained in possession, in case of an apprehended fight over the property. Thus Straight, J., was clearly of opinion that the person to be annoyed must be on the premises, otherwise there could be no criminal trespass. At page 467 he remarks : "But with intent to annoy whom? Any person in possession is here intended, express or implied, constructive in the sense of 'legally entitled to,' or actual as contemplated in Section 530 of the Criminal Procedure Code." Then the learned Judge came to the conclusion already stated.

5. This case was followed in *Kunji Lal v King Emperor*<sup>1</sup> In this case the alleged offenders had taken possession of the zamindar's property, but the property itself was in the immediate possession of a person who did not object to possession being taken of it. It was held that the constructive possession of the zamindar was not enough to sustain a conviction for criminal trespass.

6. Applying the law to the fact of this case, it is clear that Kanhaiya Lal was not in possession of the house at the moment the trespass was committed, either by himself or through any other person the house was absolutely empty. He no doubt had the legal right to possession, but that is different from being "in possession" within the meaning of Section 441 of the Indian Penal Code. We, therefore, are of opinion that as regards the first point, that has been made good by the applicants.

7. That in itself is sufficient to dispose of the case but we wish also to deal with the question of intent.

8. On the facts we have no doubt whatever that Moti Lal's intention in doing the act complained of was to assert his title and gain and hold the possession of the premises &s against Kanhaiya Lal. The fact that he was holding 7 out of 8 adjoining shops against the will of Kanhaiya Lal points strongly to this conclusion and we accept the principles of the decisions to which we have been referred. They are *Vallappa v. Bheema*<sup>2</sup> and King *Emperor v. Gaya Bhar*<sup>3</sup>

9. In our opinion the words of the section must be closely adhered to and there must in all these cases be found an intent to cause intimidation, insult or annoyance. A conviction cannot, in our opinion, follow merely because one can pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance.

10. Indeed in the ordinary case where a man steals into a house by night to carry on a secret intrigue with, say a widowed woman of age, he must be well aware that his conduct would cause great annoyance to the other members of her family who may at the time be within the house, If that is the only state of facts, he cannot be convicted under this section as his presence in the house was in consequence of a purpose and intent quite other than of annoyance. Therefore upon this ground also we are of opinion that the contention put forward on behalf of Moti Lal was right.

11. In the circumstances, we allow this application in revision and we set aside the conviction and sentence, and if Moti Lal has in fact paid the fine, that amount must be refunded to him.

#### Cases Referred.

1(1914) 12 A.L.J. 151

2(1918) 41 Mad. 156

3(1916) 38 All. 517.