

CALCUTTA HIGH COURT

State (Calcutta)

Vs.

Abdul Sukur

Criminal Ref. No. 85 of 1957

(N.K. Sen, J.)

28.01.1958

JUDGMENT

N.K. Sen, J.

1. This is a reference under Section 438 of the Code of Criminal Procedure made by Sri S.N. Bagchi. Additional Sessions Judge, 24 Parganas recommending that the conviction of the accused Abdul Sukur under Section 448 of the Indian Penal Code may be set aside, the learned Judge being of the opinion that no offence has been made out on the prosecution case itself.

2. On a charge-sheet submitted by the Police against Abdul Sukur and another under Section 147/ 448 of the Indian Penal Code. Abdul Sukur stood his trial, the other accused person was absconding.

3. The charge against Abdul Sukur was as follows :

"That you, on or about the 28th day of July, 1953 at Mudali P. S. Matiaburuj committed house trespass by entering into and remaining in the building of Gulum Md. used as a human dwelling with intent to annoy Gulam Mohammad and thereby committed an offence punishable under Section 448 of the Indian Penal Code and within my cognizance."

4. As the learned Judge has not discussed the case in detail, I have gone through the record myself.

5. The prosecution case was that Abdul Sukur and the absconding person Abdul Gaffur were tenants of the complainant Gulam Muhammad Shah in respect of three cottas of land over which some huts were constructed by the accused persons. The lands with the huts thereon were purchased by the complainant Gulam Muhammad Shah in auction sale in execution of a decree against the accused. The complainant thereafter obtained vacant possession through the Civil Court peon with police help. After having obtained possession the complainant locked up the

southern gate but allowed some men, who were carrying on a tailoring business to live there. It was alleged that on 27-7-1953 at about 9 A.M. the accused persons and many others came to the place, drove out the persons who were carrying on the tailoring business and forcibly took over possession. The complainant, however, was not present at the time. The accused person who stood his trial took up the plea that the complainant could never get actual physical possession of either the land or the huts in dispute and that the present case was the outcome of a grudge. The learned Magistrate on a scrutiny of the evidence found that the complainant was "in actual physical possession through his men." He, therefore, held that "the fact of a house trespass had been well established."

6. Admittedly the complainant's case was that the complainant himself did not live at the place and that his possession of the land and rooms in question was through the tailors, whom he allowed to live there. The question, therefore, that now arises for consideration is whether on the charge and on the admitted facts, the present conviction is maintainable. The charge in the case was for commission of a house trespass by entering into and remaining in the building of Gulam Muhammad used as a human dwelling with intent to annoy Gulam Muhammad.

7. In order to make out a criminal case the elements mentioned in Section 441 of the Indian Penal Code have to be proved. Section 441 of the Indian Penal Code is divided into two parts, the first part refers to the case of entering into the premises with the intent mentioned therein. In this part the entry itself must be unlawful, in the second part the entry is lawful but it is the subsequent remaining there with the intent mentioned in this part of the section that makes the remaining unlawful. In the present case the charge as framed is an involved one. The prosecution wanted to prove that the entry itself was unlawful. If that was proved it was of no consequence that the subsequent remaining was also unlawful.

8. The complainant was undoubtedly absent at the time when the alleged unlawful entry was made. The question, therefore, is if the complainant himself was not present, who was the person whom the accused intended to annoy. The evidence in the case has nowhere suggested that the accused had the intent of annoying Golam Muhammad. It is also not the case of the complainant that by entering into the building the accused persons intended to commit any other offence. It may be that by those entry into the building the ultimate result would be to cause annoyance to the complainant. It was pointed out in the case of *Satish Chandra Modak v. The King*¹. by Sen J. that the intent to annoy and intimidate must be not with respect to any and every person connected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by Section 441 of the Indian Penal Code. The view was also taken by Debabrata Mookerjee, J. in the case of *Bata Krishna Ghosh v. The State*², where His Lordship also pointed out that a mere knowledge on the part of the accused that the result of their act is likely to cause annoyance or insult or intimidation to the complainant was wholly insufficient to sustain a charge of trespass. The section indeed speaks not of knowledge but of intention. I would, therefore, respectfully follow the decisions mentioned above and hold that the findings with which the accused was charged was not made out.

9. The Reference is accepted and the conviction and sentence passed on the accused are

¹53, Cal WN 402: (AIR 1949 Cal 107)

²61 Cal WN 404: (AIR 1957 Cal 385)

set aside and the accused acquitted.
Reference accepted.