
(2007) 12 GAU CK 0029
In the Gauhati High Court
Case No : Criminal Appeal No.385 of 2002

Geeta Banikya

APPELLANT

Vs

Niva Banikya and Ors.

RESPONDENT

Date of Decision : 07-12-2007

Acts Referred:

Penal Code, 1860 — Section 441
Penal Code, 1860 (IPC) — Section 441

Citation : (2008) 2 GLR 4

Hon'ble Judges : H.Baruah, J

Bench : Single Bench

Advocate : A.K.Hussain, M.K.Mazumdar, M.Sordoloi, S.Alim, S.C.Biswas,
Advocates appearing for Parties

Judgement

1. Respondents Smt. Niva Banikya wife of Sri Bhuban Das, Sri Bhuban Das, son of Sri Bhabani Prasad Das and Sri Prandip Das son of Sri Bhuban Das were all tried by the learned SubDivisional Judicial Magistrate, North Salmara under sections 447/34, 427/34 and 379/34, IPC and acquitted all of them having not found guilty under those charges.
2. Feeling aggrieved by the judgment of acquittal the complainant appellant who initiated the original proceeding of C.R No. 322 of 1998 filed this appeal challenging its legality and correctness thereof.
3. Before entering into the merit of this appeal it would perhaps be appropriate for this court to make a short survey of the prosecution case for better appreciation and understanding.
4. The factual matrix of this appeal can be summarized as under. The appellant Smti Geeta Banikya (P. W. 1) is the wife of Sri Jitendra Banikya (P.W.2). She as complainant filed a complaint (Ext.I) before the SubDivisional Judicial Magistrate, North Salmara against the respondents who are husband, wife and son alleging, inter alia, that the land described in the Schedule of the complaint belonged to

her and she had been possessing the same by constructing the houses thereon. It is further alleged in Ext. 1 that the land originally belonged to her husband Sri Jitendra Banikya who gifted the same to her by a registered deed of gift. Till 9.9.1998 she had been possessing the said land peacefully without any disturbance from any corner. But suddenly on 10.9.1998 the respondents criminally trespassed into the said land and destroyed the houses thereon and also removed the building materials there from. It is to be noted that since long before of the occurrence, the respondents were trying to take forcible possession of the said land for which she had to file civil suit against the respondents. The said civil suit is still sub judice. Protest was made, but the respondent threatened the appellant, she stood as a mere spectator with some of her witnesses. The value of the property removed by the respondent had been shown at Rs. 25,000 approximately.

5. On the lodgment of the said complaint the learned Magistrate issued search warrant for recovery of the stolen articles and police on the strength of the said search warrant seized some articles (building materials) vide Seizure Memo Ext. 4 and produced before the court. After examination of the appellant under section 200 of the Cr.PC and another witness, the court took cognizance of the offences under section 447/427/379/506 read with section 34 of the Penal Code and issued process against the respondents.

6. Before framing of the charge, the learned trial court examined 2 witnesses and after hearing both sides, the learned trial court was pleased to frame charges against the respondents as above. After charge, the witnesses were further cross-examined. It is to be noted that another witness (P.W.3) was also examined and cross-examined and discharged.

7. At the conclusion of the trial learned trial Magistrate failed to record a finding of conviction and acquitted all the respondents. Hence, this present appeal.

8. Heard Sri S.C. Biswas, learned counsel assisted by Sri M.K. Mazumdar, Mr. A.K. Hussain, Ms. M. Bordoloi, Mr. S. Alom and Mr. Z. Ahmed for the appellant and also heard Mr. B.S Sinha, learned Additional P.P. for the State of Assam, one of the respondents.

9. Two pertinent questions are raised by the learned counsel for the appellant:

(a) That the learned trial court misread the evidence of the witnesses and, thus, failed to appreciate the evidence on record in its proper perspective and, thus, arrived at an erroneous finding.

(b) That the learned trial court failed to appreciate the law that in a case under section 447, IPC possession is alone concerned and not the ownership. Institution of a civil suit against the respondent for the land where trespass had been committed and other offences under section 447/427/379, IPC cannot destroy criminal liability. Accused respondents being not in possession of the land cannot take the law in their own hands. Their acquittal holding the fact of

institution of a civil suit in respect of the land is bad in law and it cannot take the fishes out of water. The learned trial court, thus, committed error and illegality in acquitting the respondents from the charges.

10. Now let us take and decide the issue No. (a). It is already on the record that only 3 witnesses were brought unto the witness box for proof of the charges. They are, appellant, her husband and their son. All the witnesses categorically stated that the disputed land belonged to them and the appellant got the said land from her husband (P.W.2) under a deed of gift. They have been occupying the same by constructing houses thereon. On the date of occurrence respondents by entering into the said land demolished the houses and had removed the building materials. It is also in their evidence that a civil suit is pending in between the appellant and the respondents for the said land. P.W 1 and P.W.2 have described the boundaries of the disputed land which, however, did not tally with the boundaries as described in Ext 1. From the crossexamination of the witnesses it has become apparent that the respondents' residential houses were in the disputed land within the same plot. It is also in the crossexamination that the accused/respondents are in the possession of the land. There is no distinct testimony offered by the appellant about the date of possession of the disputed land by the respondents. Therefore, this fact remained in darkness and it was not in a position to distinguish the date of possession. If the respondents were possessing since long before there cannot be any question of trespass.

11. The learned trial court while rendering the impugned judgment had taken into consideration of this aspect and also the other aspect like discrepancies appearing in describing the boundaries and also in the context of taking advance from several persons for sale of some portion of the land for need of money. Learned trial court had taken into consideration all these aspects more particularly, institution of civil suit between the parties in respect of disputed land and held that the respondents cannot be held guilty of the charges and accordingly acquitted them. It is true that in a case under section 447, IPC, possession is alone material and not the ownership. In that context of the matter the evidence should be of such that no prudent man can disbelieve the testimony regarding possession. It is in the evidence that P.W. 1 (appellant) who got the land from her husband through gift and the said gift deed was duly registered and proved as Ext. 3 in the court. Interestingly, this gift deed and some other exhibits left out of sight of the court for consideration for proving of possession. When there is absence of cogent and acceptable evidence, mere statement of ownership of the land and possession of the land cannot be accepted. It is apparent from the evidence on record that all the three P.Ws. are husband, wife and son and no independent witnesses have been examined in support of the case of the prosecution. It is brought unto the record through crossexamination of the witnesses that the appellant and her family members had animosity with the respondents. Animosity is a double edged weapon which cuts in both ways. Since the appellant, P.Ws. 2 and 3 had/have animosity with the respondents it cannot be ruled out that the present case is outcome of the same and vice versa.

12. Learned trial court, thus, by resorting to noteworthy testimony of the witnesses refrained herself from recording conviction against the respondents. Learned counsel for the appellant argues that the testimony available in the record are sufficient to warrant conviction of the respondents under the charges. Evidence on record never speak of possession the land in favour of the respondents. The respondents took the law in their own hands and for that they cannot be absolved from the criminal liability as charged. It was argued by Sri S.C. Biswas, learned counsel for the appellant that the factum of seizure of housing materials from the house of the respondents makes the position clear and unambiguous that they committed trespass into the land and had removed the housing materials there from. This aspect of the matter was not considered by the learned trial court, Sri Biswas argued. However, from the totality of evidence on record it would not be proper to criticize the findings of the learned trial court.

13. Now let us concentrate to the second issue (b). It was argued by Sri S.C. Biswas, learned counsel for the appellant that the learned trial court failed to appreciate the law under section 447, IPC and for that the learned trial court failed to record a finding of conviction against the respondents.

14. In this context, it would be appropriate to concentrate to the definition of "criminal trespass". Section 441 of the Indian Penal Code reads as under:

"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 enter into or upon such property, unlawfully remains therewith intent thereby to intimidate, insult or annoy such person, or with intent to commit an offence, is said to commit "criminal trespass".

15. The section requires that the offender must enter into or upon such property which belongs to another with intention 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 intention thereby to intimidate, insult or annoy any such person in possession of the property. Therefore, intention at the time of entry or thereafter is material for determining the liability for the offence. In other words entry into or upon another's property without the requisites is not criminal trespass. Every unauthorized entry is not criminal trespass unless there is an intention to intimidate, insult or annoy the person in possession of the property.

16. We have found from the records that the accused/respondents have/had their residential building in the same plot. There is also evidence that they have been possessing the land since long. There is no specific evidence about the date of possession. Therefore, finding of the trial court that there cannot be criminal trespass into land cannot be tainted with illegality or erroneous. Institution of the civil suit against the respondents in respect of the plot of land also makes the

issue clear that the respondents staked their claim over the said plot of land. When an accused asserts his right to possess a disputed property, unless he is evicted by the court, it is held that he cannot be held guilty criminal trespass as he is acting bona fide and thus has no requisite intention.

17. There is no evidence of independent witness on record to show that the appellant had constructed the houses thereon which had allegedly been destroyed.

18. Defence case is that appellant never constructed any house on the land. Therefore removal of the C.I. sheets cannot be accepted. C.I. sheets and other materials seized by police all belonged to them. Burden of proof of a criminal case is always on the prosecution. When the prosecution discharges its burden fully, onus shifts to the accused to disprove some of the facts. Here in our present case, the first and foremost burden of the appellant was to prove the possession beyond all reasonable doubt with cogent and acceptable evidence. Apparently, the evidence on record do not show that the appellant discharged, this burden strictly. Therefore, the burden cannot be shifted to the respondents.

19. Having considered all the facts and circumstances of the case and the evidence on record, this court finds no ground to interfere with the impugned judgment passed by the learned trial court.

20. In the result, the impugned judgment of acquittal is accordingly affirmed.