
(1963) 07 GAU CK 0006
In the Gauhati High Court

Hariprasad Kanu and Another

APPELLANT

Vs

The State of Assam and Another

RESPONDENT

Date of Decision : 27-07-1963

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 522
Penal Code, 1860 (IPC) — Section 143, 447

Citation : (1965) CriLJ 613

Hon'ble Judges : G. Mehrotra, C.J

Bench : Single Bench

Judgement

G. Mehrotra, C.J.—The two petitioners, Hariprasad Kanu and Bhubaneswar Kanu have been convicted under Sections 143 and 447, I. P. C., and sentenced to three months rigorous imprisonment and one month rigorous imprisonment respectively. Must. Sonia Haluwani was also convicted under the above two sections to a sentence of fine of Rs. 200 and Rs. 100 on each count, and there was further an order u/s 522, Criminal Procedure Code to put Abdul Khalek to possession of the land in question. Musst. Sonia Haluwani is dead and we are only concerned with the case of the two applicants, Hariprasad Kanu and Bhubaneswar Kanu.

2. The prosecution case is that Mahmuda Khatun and Gulenar Begum obtained a decree for khas possession of a piece of land situated at Athgaon Road, Gauhati in Title Suit No. 303 of 1948 against Mt. Sonia Haluwani. On the 5th February, 1956, in execution of the decree, the decree-holders got delivery of possession by the removal of the houses standing thereon. After the delivery of possession, they constructed a fencing around the land and posted a chowkidar. But in the evening of the same day, Musst. Sonia with her sons, the two petitioners before us, Hanprasad Kanu and Bhubaneswar Kanu and some others, forming themselves into an unlawful assembly with the common object of trespassing into the land, actually trespassed into the land, broke open the fencing and constructed a house thereon. To this effect, a first information report was lodged at the Gauhati Police station by Abdul Khaleque, husband of Mahmuda Khatun.

On these facts, Musst. Sonia, the two petitioners, and accused Lakhiprasad, Dukhu Mistri, Ram Chandra Mistri and Anaras Mistri and others were charged under Sections 143 and 447, Indian Penal Code. The Magistrate convicted Hanprasad Kanu, Bhubaneswar Kanu and Musst. Sonia and acquitted the others. On appeal, first of all, the appellants were acquitted, but on revision to this Court, the order of acquittal was set aside and the case was sent back to the Appellate Court for rehearing. During the proceedings on remand, Musst. Sonia died. The Sessions Judge reduced the sentence to a fine of Rs. 100 under each of the Sections 143/447, I. P. C, and confirmed the order for the restoration of the possession of the land to the complainant.

3. The first point urged by the petitioners is that as only three persons have been convicted, the charge u/s 143, I. P. C. is not made out. In this connection, it is further urged that it is not the case where each one of the applicants was charged with or committed an offence u/s 143, I. P. C., along with others who were not on trial. If, therefore, the finding is that the persons other than the applicants were not guilty, the two persons cannot be convicted u/s 143, I. P. C. Reliance is placed on Mohan Singh Vs. State of Punjab, , and on this point, it is clearly stated at pages 178 and 179 in the following terms:

In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge u/s 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted u/s 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge u/s 149 it is not necessary that five or more persons must necessarily be brought before the Court and convicted. Similarly, less than five persons may be charged u/s 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants or members composed an unlawful assembly, those before the Court can be convicted u/s 149 though the un-named and unidentified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names

five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the Court less than five persons to be tried then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge u/s 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge u/s 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the Court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the Court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the Court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the Court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified.

4. This passage clearly shows that in cases where five persons are charged and two of them are convicted, still the charge will not fail if the Court on the evidence before it comes to the conclusion that there were other members of the unlawful assembly and the number was more than five. In the present case, at no stage the point was taken by the accused that there was no evidence to show that there were no other persons forming the unlawful assembly except those, who were charged and tried by the Court below. The evidence of some of the witnesses was read out to me and the witnesses have clearly implicated more than five people, though others were not identified and thus, they were not charged and put up for trial. There is thus no force in this contention.

5. Both the Courts below have found that the complainant has proved that possession was given to the decree-holder, and after the decree-holder put up a fencing, the applicants forcibly demolished the fencing, entered the land and put up some construction. On the facts thus proved, an offence under sections 143 and 447, I. P. C., is fully made out. It was contended that the applicants made a bona fide claim to the land, inasmuch as they were paying rent to the Municipality and thus the offence u/s 447 was not made out. In a suit against the

mother of the two applicants, a decree for ejectment was obtained. The decree-holder obtained possession. The sons were living with the mother. The mother was a tenant and thus they were not impleaded as parties under the alleged suit. Under those circumstances, as the petitioners tried to obstruct the decree-holder from taking possession and trespassed on the land, after possession had been delivered to the decree-holder, the offence was clearly proved and there is no question of a bona fide claim or right.

6. The last point urged is that the order u/s 522, Criminal P. C., for delivery of possession to Abdul Khalek is not warranted by law. The Magistrate found that the complainant was dispossessed by use of criminal force and on that finding Section 522, Criminal P. C., is attracted. There is thus no ground to interfere with the decision of the Sessions Judge.

The petition is rejected.