

(2011) 07 KL CK 0214
In the High Court Of Kerala
Case No : Criminal MC. No. 991 of 2011

P.T. Rajan Babu Vaidyan and P.T. Mohan Babu Vaidyan	APPELLANT
Vs	
Anitha Chandra Babu and State of Kerala	RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3)
Penal Code, 1860 (IPC) — Section 34, 378, 379, 441

Citation : (2011) 3 KLJ 519 : (2011) 4 RCR(Criminal) 81

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : V.V. Raja, for the Appellant; S. Sreekumar, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph

1. Could a person who removes standing timber from the property in his possession even after the civil court has declared title of the complainant and allowed him to recover possession of the said property be charged with the offence of "theft", is the question arising for a decision in this case.

2. A resume of facts necessary for a decision of the question is: The first respondent secured a decree from the court of learned Munsiff, Punalur in O.S. No.420 of 1997 on 09.07.2008 declaring her title over 33= cents of land in Sy.No.475/9B, 475/9B/21, 475/8A1 and 475/8A20 in Punalur Village, directing petitioners to surrender possession of the said property to the first respondent within one month of the date of decree and failing which, allowing the latter to recover possession of the property through court. Petitioners challenged that decree in the appellate court and obtained stay of execution of the decree for recovery of possession. On 17.02.2011 the first respondent filed a complaint before learned Judicial First Class Magistrate-III, Punalur complaining that while the appeal was pending petitioners and their men with intent to remove the

timber, cause wrongful loss to the first respondent and make wrongful gain for themselves, cut down a few trees from the said property on 08.01.2011. First respondent complained to the Punalur Police who directed petitioners not to remove the timber from the property. On 01.02.2011 petitioners and their men removed the timber without consent of the first respondent. That according to her, amounted to an offence punishable u/s 379 read with Section 34 of the Indian Penal Code (for short, "the IPC"). Learned Magistrate forwarded the complaint to the Punalur Police u/s 156(3) of the Code of Criminal Procedure (for short, "the Code"). The Sub Inspector, Punalur registered a case as Crime No.299 of 2011 under Sec.379 read with Sec.34 of the IPC against petitioners and started investigation. Petitioners have approached this Court to quash Annexures 1 and 2, the complaint and the FIR. Learned counsel for petitioners contended that no offence of theft is even prima facie made out from Annexure-1, complaint in that even according to the first respondent, property wherefrom the trees were cut and removed was in the possession of petitioners and hence the essential ingredient to constitute the offence of "theft", i.e., taking the property (timber) from out of the possession of first respondent is lacking. It is contended that learned Magistrate has mechanically forwarded the complaint to the Police under Sec.156(3) of the Code without even referring to the allegations in Annexure-1, complaint. It is contended that what is involved is only a civil dispute regarding title over the property. Hence it is argued that Annexures-1 and 2 being an abuse of the process of the law, may be quashed. Reliance is placed on the decisions in Shaik Abdul and Another v. Emperor (115 IC 684) and Varghese v. State of Kerala (1964 KHC 213).

3. Learned counsel for first respondent contended that in view of the decision of the civil court (referred supra), the de jure possession of the property is with the first respondent, possession of petitioners if any, is only on behalf of the first respondent, its rightful owner as declared by the civil court, and hence removal of timber is from the possession of the first respondent. Reliance is placed on the decision in Pyare Lal Bhargava Vs. State of Rajasthan, . Learned counsel has drawn my attention to Ratanlal and Dheerajlal on the Indian Penal Code, pages 2019 and 2020. It is also contended that if not "theft" other offences may be involved on the facts and hence interference at the stage of investigation is not required. Leaned Public Prosecutor also has taken that stand in the matter.

4. It is stated in Annexure-1, complaint that learned Munsiff declared title of the first respondent, directed petitioners to surrender possession of the property within one month and on failure, permitted first respondent to recover possession of the said property through court as per a decree dated 09.07.2008. It is admitted that petitioners did not surrender possession as directed in the decree; instead, they preferred an appeal and obtained stay of execution of the decree for recovery of possession. Hence first respondent could not execute the decree and get possession of the property. The appeal was pending and the order of stay was in force on 08.01.2011 when the trees were (allegedly) cut from the said property and on 01.02.2011 when petitioners removed the timber.

5. Salmond on Jurisprudence (12th Edn., at page 273) says that the test,

for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it - in which event he clearly has possession - we have to ask whether facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others.

"Possession" is a polymorphous term which may have different meanings in different contexts. "Possession" implies the physical capacity to deal with the thing as the possessor likes to the exclusion of every one and a determination to exercise that physical power on his own behalf. In some context, "possession" embraces both actual possession and possession in law. To put it short, "possession" is, as it were, the position of the foot (*possessio est quasi pedis positio*). Even a trespasser can be in actual possession, may be wrongful against the true owner of the property.

6. In the present case the first respondent, admitting that petitioners are in possession of the property sued them for recovery of possession on the strength of title she claimed and the court declared her title and directed petitioners to surrender possession of the property within one month. In case they failed to do so, the court allowed the first respondent to recover possession through court. But the appellate court stayed the decree for recovery of possession. Appeal is still pending. Appeal is a continuation of the suit. Appellate court is yet to say whether petitioners have title over the property as they claim and continue in possession. Hence it may not be possible to characterize possession of petitioners as unlawful. At any rate, petitioners are in actual, physical possession of the property whatever be its nature.

7. Section 378 of the IPC defines "theft" as the dishonest removal of movable property "out of the possession of any person" without the consent of that person. Standing timber being embedded in the earth is immovable property but the moment it is severed from the earth it becomes capable of being the object of theft. What then is the nature of "possession" referred in Sec.378 of the IPC? Is it merely possession in law or it is actual, physical possession? The first respondent though her title was declared, had no actual, physical possession of the property. Nor was petitioners in possession of the property for and on behalf of the first respondent. They claimed title over the property for themselves. Hence no question of any express or implied trust or principle of agency is involved in the matter of possession of petitioners. "Possession" referred to in Sec.378 of the IPC in my opinion, is actual, physical possession.

8. *Subudhi Rantho v. Balarama Tudi* (13 MLJ 123) was a case of theft by the tenant of the share of crop of the landlord, with the tenant. It was held, generally that until delivery by the tenant to the landlord, the latter's share of the crop was with the tenant. The question whether in such a case the tenant could be charged with the offence of "theft" when he removed the share of crops payable

to the landlord was referred to Oldfield, J. (In Re, Annamalai Odayar and Others - 1914 [22] IC 762). In that case the courts below had found that the paddy which the accused had been convicted of stealing was in the joint possession of the landlord, (complainant) and the tenant (first accused). Oldfield, J., found no reason for not applying the principle laid down in Subudhi Rantho's case (supra) to the facts of the case and held that removal by a tenant of the heap of grain (payable to the landlord) in his possession and control does not amount to "theft" unless there was actual delivery to the landlord of his share of the grain, although, the landlord may have put a seal on the heap (of grain). The possession (of the share of grain payable to the landlord, the complainant), it was held by Oldfield, J., should, therefore have been held to be of the tenants" and the convictions for theft were found unsustainable.

9. In that case the tenant (accused) though in actual possession of the share of grains, was holding it for the landlord (complainant). Still, removal by the tenant of the grains (from his own possession) was found to not amount to "theft" notwithstanding the jural relation in which the tenant was possessing the grain on behalf of the landlord. In the present case, no jural relationship exists between petitioners and the first respondent. The former are in possession of the property on their own, asserting title for themselves.

10. "Theft" in this country is an offence against possession, and not title. One of the distinctions between the English law and the Indian law of theft is that the English law looks to ownership while the Indian law looks to possession. As Sec.378 of the IPC itself indicates, to constitute the offence of "theft" one should "take" the movable property "out of the possession of any person" without the consent of that person. In its usual signification the word "taken" implies a transfer of possession, dominion or control. A thing is not "taken" unless such a change of status is effected. The expression "take" when used in relation to a movable property means, "to deprive one of the possession". Thus, to "take" the timber, out of the possession of the first respondent, she should have been in "possession" of it, but she had none. It is immaterial whether petitioners had title over the timber or the land where it stood at the time of its severance or not. The criminal court is not required to adjudicate on rival claims of title claimed by the parties. All that the criminal court has to decide is whether at the time of the alleged incident the property which is the subject matter of theft was in the "possession" of the complainant and whether it was taken out of the possession of the complainant with a dishonest intention (See Boddepalli Lakshminarayana Vs. Suvvari Sanyasi Appa Rao and Others, . In Shaik Abdul and Another v. Emperor (supra) petitioners were convicted of offences under Secs.144 and 379 of the IPC. Learned Judge observed,

we are not in the present case concerned with the title of either party to the land. What we are concerned with is who were in possession on the day of the occurrence without or without title and who grew the crops in question.

(emphasis supplied)

Though referring to Sec.441 of the IPC which deals with trespass into or upon property in the "possession of another", the Punjab High Court held in *S. Gurdial Singh and Others Vs. Abhey Dass*, that "possession" (referred in Sec.441 of the IPC) must be actual possession of some person other than the alleged trespasser.

11. In *Varghese v. State of Kerala* (supra) the accused was acquitted of the charge of theft of standing tree as at the relevant time he was found to be in possession of the property, whether by trespass or not. In *State of Maharashtra Vs. Vishwanath Tukaram Umale and Others*, also it is held that "possession" is an essential element of the offence of theft of movable property and such property should have been taken out of the possession of another person without his consent. The decision in *Pyare Lal Bhargava v. State of Rajasthan* or the passage read out to me from *Ratanlal and Dheerajlal* does not take any different view on the above crucial question.

12. Thus, to commit "theft" one should have taken the movable property "out of the possession of another", without the consent of that person. "Possession" in the context it is used in Sec.378 of the IPC is actual, physical possession. In the present case whether wrongful or not, the property in question wherefrom trees were severed and removed was in the actual, physical possession of petitioners. In the view I have taken I hold that petitioners who (are alleged to have) removed standing timber from the property in their possession even after the civil court declared title of the first respondent/complainant and allowed her to recover possession of the said property cannot be charged with the offence of "theft". If so, on the averments in the complaint no offence of theft is made out. Learned Magistrate while forwarding Annexure-1, complaint to the Police under Sec.156(3) of the Code has not applied mind to this crucial aspect of the matter. Annexure-1, complaint and Annexure- 2, FIR to the extent it concerned offence punishable under Sec.379 read with Sec.34 of the IPC cannot stand.

13. Learned counsel for the first respondent contended that since the matter is under investigation, it may be possible that in the course of investigation any other offence may be revealed or disclosed and if the complaint and FIR are quashed, that will impede such investigation by the police. I make it clear that in this proceeding I am only concerned with the offence of "theft" as attributed to the petitioners. This court has not gone into the question whether any other offence is disclosed from the allegations in Annexure-1, complaint. Resultantly, Criminal Miscellaneous Case is allowed. Annexure-1, complaint and Annexure-2, FIR to the extent it concern the offence punishable under Sec.379 read with Sec.34 of the IPC against petitioners are quashed. All pending Criminal Miscellaneous Applications will stand dismissed.