
(1981) 08 KL CK 0004
In the High Court Of Kerala

Tharakan Iyyavu Francis

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 31-08-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 34, 378, 379

Citation : (1982) CriLJ 309

Hon'ble Judges : P. Janaki Amma, J

Bench : Single Bench

Judgement

Kumari P. Janaki Amma, J.—This petition is filed u/s 482 of the Criminal P.C. for quashing the complaint in C. C. No. 177 of 1981 on the file of the Judicial Magistrate, Second Class, Chavakkad.

2. The respondent filed the complaint on the following allegations. The respondent and his family were residing as kudikidappukars in a property owned by the petitioners. The kudikidappu right has been declared by the Munsiff's Court, Wadakkancherry and the decision has been confirmed by the District Court. While so, the building where the respondent was living fell down in part and respondent was not in a position to live in that building. He shifted his residence temporarily to the house of one of his brothers. In front of his kudikidappu there is a water-channel constructed by the State Public Works Department. To facilitate access to his residence the respondent had put eight concrete slabs over the water channel. According to the respondent, on 19-3-1981 at about 8.00 p.m. the petitioners herein removed three of the slabs and sold them to one Thomas, who resides close by, for an amount of Rs. 50/-. When the respondent questioned, the petitioners used abusive language against him. A petition was filed before the police. But it did not receive favourable response. The complaint was thereupon filed before the Court alleging offences u/s 379 read with Section 34 of the Penal Code.

3. The contention of the petitioners is that the complaint does not disclose any

offence. An offence u/s 379 presupposes possession of movable property. In the instant case it is contended that the slabs were fixed to the earth and therefore it is not a movable property. Even assuming that the slabs are movable property it is contended that the ingredients of an offence of theft have not been made out inasmuch as the respondent was not in possession of the article when the removal took place.

4. Whether the complaint should be quashed or not depends among other things on the question whether it discloses an offence. The authorities are uniform that if the complaint does not disclose any offence it is open to the High Court to invoke its inherent powers and quash the complaint". In the instant case, the offence alleged is one of theft. The averments in the complaint would go to show that it was the respondent who expended money for making the slabs and putting them over the Public Works Department water channel and the purpose was to provide ingress and egress to his residence from the public road. There is no scope for doubt that the slabs stated to have been removed are movable property. The recitals in the complaint do not show that the respondent surrendered either the ownership or possession of the slabs to the Public Works Department. The stand taken by the respondent is that in spite of the fact that the slabs were placed on a public channel, he retained both ownership and possession of the slabs and removal of the same without his consent amounted to theft. It was further contended that even if the alleged act of the petitioners did not amount to theft, it satisfied the ingredients of mischief and it is open to the Court to frame a charge for an offence of mischief or for any other offence that is made out by the materials placed before it.

5. There is force in the contention put forward by the respondent. u/s 378 of the Penal Code theft means dishonest removal of movable property from the possession of any person without that person's consent. Possession in the case of a movable property involves the physical capacity to deal with the thing to the exclusion of others. As Salmond put it, 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 the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others"¹. (Salmond on Jurisprudence, 12th Edn. p. 273). In the instant case, assuming that the respondent is the owner of the slabs, it was open to the Public Works Department to object to his placing the slabs over the channel. But the placing of the slabs by itself may not amount to transfer of either ownership or possession thereof. In the absence of proof of transfer or of abandonment by him of his possession and in the absence of any law which takes away his right to possession, a person may not lose his possession of an article simply because he keeps the thing at a public place. "A man walking along the road with a bundle sits down to rest, and places the bundle on the ground at a short distance from him. No one think of doubting that the bundle remains in his exclusive possession, not symbolically or fictitiously, but really and actually whereas the

ground on which he sits, and with which he is, in corporal contact, is not in his possession at all": (Markby?Elements of Law). "A person in leaving a cycle temporarily outside a market, with a view to come back and take it, does not abandon or lose it. The cycle remains in his possession and when he leaves it he does not intend to give up his possession or his dominion over it. The cycle cannot be said to have been out of his possession at any time and consequently dishonest removal of it with intention to take it out of his possession would amount to theft" : (Ratanlal - Law of Crimes 22nd Edn. p. 988). An analogous principle may apply in the instant case. Once it is made out that the concrete slabs were put on the water channel by the respondent, unless it is proved that he has abandoned possession thereof, or that the ownership or possession passed to the Public Works Department, the slabs continued to belong to the respondent and in his possession. He must be presumed to have the right to take away from over the channel where there (they?) are placed if he so wills. Therefore, a dishonest removal thereof by another person without his consent would amount to theft.

6. Assuming that by putting the slabs on the water channel there was transfer of ownership and possession in favour of the Public Works Department, the removal thereof by the petitioners may amount to mischief. I may also refer to illustration (g) to Section 378 which reads:

A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

7. It may be that the offence mentioned in the complaint is one of theft; but in case the Court, on a consideration of the facts mentioned in the complaint, finds that an offence other than that mentioned has been committed, it is open to the Court to frame an appropriate charge.

The discussion in the foregoing paragraphs will show that it cannot be said at this stage that the complaint does not disclose an offence. The petition for quashing the complaint is therefore dismissed.