

SMT. KANWAL SOOD

v.

NAWAL KISHORE AND ANOTHER

November 26, 1982

[D.A. DESAI, AND R.B. MISRA JJ.]

*Criminal trespass—Donor reserving life interest in the house gifted to the donee—Permitting another to reside with him—Status of that person after the death of the donor whether his occupation would amount to Criminal trespass—Penal Code Section 441 as amended by U.P. Act 31 of 1961.*

Premises, "Aranaya Kutir" bearing Municipal No. 47A Jakhan in Dehradun was owned by one Shri R.C. Sood. He executed a gift deed in favour of Shree Anand Mayee Sangh, Dehradun, with a stipulation that the donor shall remain in possession of the premises during his life-time and after his death his widow if alive would remain in possession. The management of the same would be taken up by the Sangh after their death.

In 1967, the appellant, the widow of the brother of Shri R.C. Sood was invited by Shri Sood to reside with him in the aforesaid house and ever since she has been residing peacefully there. On 10th of October, 1973 Shri R.C. Sood expired. Respondent No. 1, Shri Nawal Kishore as secretary of the Anand Mayee Sangh, served a notice dated 13th November, 1973 on the appellant asking her to vacate the premises immediately, and threatening to take criminal action against her on failure to do so, as her further stay in the premises would be deemed to be in the nature of a criminal trespass. When the appellant did not vacate the premises, respondent No. 1 filed a complaint under section 468 of the Penal Code. The Sub-Divisional Magistrate, Mussorie found that the continued stay of the appellant amounted to criminal trespass within the meaning of section 441 of the Penal Code, convicted her under section 448 and sentenced her to pay a fine of Rs. 100 or in lieu thereof to undergo simple imprisonment for 40 days. In addition, the learned Magistrate also passed an order directing the appellant to vacate the premises within two months of the order, purporting to be one under section 456 of the Criminal Procedure Code.

The appeal preferred by the appellant was allowed and the conviction and sentence passed were set aside. Respondent No. 1, therefore assailed the order of acquittal by filing a criminal appeal before the High Court. The High Court allowed it and reversed the order of acquittal passed by the Sessions Judge and convicted the appellant. In the opinion of the High Court, the appeal filed by the appellant before the Sessions Judge was incompetent, as no appeal would lie against the imposition of fine. The High Court declined to treat the appeal as a revision in as much as under the provisions of section 401(5) of the Criminal

A Procedure Code, it is permissible to treat a revision as an appeal but not vice versa. Hence the appeal by special leave.

Allowing the appeal, the Court

B HELD : 1:1. In order to satisfy the conditions of section 441 of the Penal Code, it must be established that the party, complained of entered in possession over the premises with intent to commit an offence. Every trespass does not amount to criminal trespass within the meaning of that section. [875 G]

C 1:2. Initiating criminal proceedings in the circumstances of this instant case is only an abuse of the process of the court. This is essentially a civil matter which could be properly adjudicated upon by a competent civil court. (a) The appellant was allowed to occupy the premises in 1967 by Mr. Sood, perhaps on 'lease and license' basis. (b) A bare perusal of the complaint filed by Respondent No. 1 makes it abundantly clear that there is absolutely no allegation about the intention of the appellant to commit any offence, or to intimidate, insult or annoy any person in possession; and (c) If a suit for eviction is filed in the civil court, the appellant, who may be fondly thinking that she had a right to occupy the premises even after the death of Shri Sood, might be in a position to vindicate her right and justify her possession. [875 E-H, 876 A, E-F]

D 2. The appeal filed by the appellant before the Sessions Judge was competent and maintainable. If the learned Magistrate had only awarded a sentence of fine, in that case revision alone would be competent and not an appeal. But in the instant case, the Magistrate not only awarded the fine of Rs. 100 but also directed the appellant to vacate the premises within two months from the date of the order. This part of the order presumably was passed under section 456 of Criminal Procedure Code, and this made the order appealable.

E [876 F-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 69 of 1981

F Appeal by special leave from the Judgment and order dated the 16th December, 1980 of the Allahabad High Court in Criminal Appeal No. 342 of 1976.

*Soli J. Sorabjee, R.K. Jain, R.P. Singh and Natin Mohan Popli* for the Appellant.

G *P.R. Mridul, Praveen Kumar, A.K. Sharma and Dalveer Bhandari* for the Respondent.

The Judgment of the Court was delivered by

H MISRA J. The present appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad,

dated 16th December, 1980, convicting the appellant under section 448 of the Indian Penal Code.

Premises Aranya Kutir bearing Municipal No. 47A Jakhan in Dehra Dun was owned by one R.C. Sood. He executed a gift-deed in favour of Shri Anand Mayee Sangh, Dehra Dun with the stipulation that the donor shall remain in possession of the premises during his life time and after his death his widow if alive would remain in possession. The management of the same would be taken up by the Sangh after their death.

The appellant is the widow of the brother of Shri R.C. Sood. It appears that in 1967 the appellant was invited by Shri R.C. Sood to reside with him in the aforesaid house and ever since she has been residing peacefully there. On 10th of October, 1973, Shri R.C. Sood expired. The appellant, however, continued to live in the said house.

Respondent No. 1, Shri Nawal Kishore as Secretary of the aforesaid Sangh served a notice dated 13th November, 1973 on the appellant asking her to vacate the premises in dispute immediately, failing which a criminal action under section 448 of the Indian Penal Code would be taken against her as her further stay in the premises would be deemed to be in the nature of a criminal trespass. The appellant, however, did not vacate the premises as she was convinced that her stay in the said premises could not amount to criminal trespass.

Respondent No. 1, Shri Nawal Kishore thereupon filed a complaint under section 448 of the Indian Penal Code against the appellant in the Court of Sub-Divisional Magistrate, Mussoorie. He examined himself as P.W. 1 and also produced Shri K. Bose as P.W. 2.

The appellant in her statement under section 313, as well as in her statement as a witness D.W. 1 admitted the services of notice on her but denied that any criminal action was called for. She further stated that she had met Anand Mayee who had permitted her to live in the house.

The learned Magistrate, however, took the view that the premises in dispute has been vested in the Anand Mayee Sangh by

A virtue of the gift-deed and a notice to vacate having been served upon the appellant, the continued stay of the appellant in the said premises amounted to a criminal trespass within the meaning of section 441 of the Indian Penal Code. He accordingly convicted the appellant under section 448 to the Indian Penal Code and sentenced her to pay a fine of Rs. 100 and in default to undergo simple imprisonment for 40 days. In addition, the learned Magistrate also passed an order directing the appellant to vacate the premises within two months of the passing of the order, purporting to be one under section 456 of the Criminal Procedure Code.

C The appellant feeling aggrieved by the order of the learned Magistrate went up in appeal and took up various grounds. The learned Sessions Judge allowed the appeal, set aside the order of the learned Magistrate and acquitted the appellant by his judgment dated 19th August, 1975. Respondent No. 1 Shri Nawal Kishore assailed the order of acquittal by filing criminal appeal in the High Court and the High Court in its turn allowed the appeal and reversed the order of acquittal passed by the learned Sessions Judge and convicted the appellant. In the opinion of the High Court the appeal filed by the appellant before the Sessions Judge was incompetent as no appeal could lie against the imposition of fine. It also took the view under the provisions of section 401(5) of the Criminal Procedure Code it is permissible to treat a revision as an appeal but not vice versa. It therefore, declined to treat the appeal against the order of Magistrate as a revision. The High Court further expressed the opinion that the appellant may file a revision if she so chooses which would be considered by the Court of Admission and then if proper the same may be allowed. The appellant feeling aggrieved by the judgment of the High Court has filed the present appeal with the special leave as stated earlier.

G Shri Soli J. Sorabji appearing for the appellant has contended that on the allegations made in the complaint no offence under section 441 of the Indian Penal Code is made out. In order to appreciate the contention it will be appropriate at this stage to read section 441 of the Indian Penal Code :

H "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 entered into or upon such property, unlawfully remains

there with intent thereby to intimate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

There has been local amendment by U.P. Act 31 of 1961 for section 441 of the Indian Penal Code, 1960, the following shall be substituted:

"441. Criminal Trespass:—Whoever enters into or upon property in 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 entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, or having entered into or upon such property, whether before or after the coming into force of the Criminal Law (U.P. Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property, or its possession or use when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice, is said to commit, 'criminal trespass'.

It may be pointed out that the appellant was allowed to occupy the premises in 1967 by Shri R.C. Sood. Under the terms of gift-deed Shri Sood was entitled to remain in occupation of the premises during his life time. He could as well grant, leave and licence to the appellant to occupy the premises along with him. Now the question arises about her status after the death of Shri R.C. Sood. At the most, it can be said that after the death of Shri Sood the leave and license granted by Shri Sood came to an end and if she stayed in the premises after the death of Shri Sood, her possession may be that of a trespasser but every trespass does not amount to criminal trespass within the meaning of section 441 of the Indian Penal Code. In order to satisfy the conditions of section 441 it must be established that the appellant entered in possession over the premises with intent to commit an offence. A bare perusal of the complaint filed by Respondent No. 1 makes it abundantly clear that there is absolutely no allegation about the intention of the appellant to commit any offence or to intimidate, insult or annoy

**A** any person in possession, as will be evident from three material paragraphs which are quoted below :

**B** "2. That the late Shri R.C. Sood was occupying the said premises in accordance with clause No. 1 of a gift-deed executed by him in favour of Shri Anand Mayee Sangh and after his demise the said premises had to be delivered to Shri Anand Mayee Sangh.

**C** 3. That after the demise of Shri R.C. Sood, the accused was repeatedly requested to voluntarily vacate and deliver the possession of the said premises to the Sangh but the accused paid no heed and hence a notice dated 13.11.1973, copy of which enclosed, was sent to the accused as required by U.P. Amendment of Section 448 I.P.C. the said notice was served upon accused on 14.11.73 as per postal A.D. receipt attached herewith.

**D** 4. That the accused was required to quit and vacate the said premises by the 20th day of November, 1973 but instead of vacating the premises the accused has been making unusual pretext and has thus committed an offence under section 448 I.P.C."

**E** The appellant may be fondly thinking that she had a right to occupy the premises even after the death of Shri R.C. Sood. If a suit for eviction is filed in Civil Court she might be in a position to vindicate her right and justify her possession. This is essentially a civil matter which could be properly adjudicated upon by a competent Civil Court. To initiate criminal proceedings in the circumstances appears to be only an abuse of the process of the Court.

**F** We also do not agree with the view taken by the Court that the appeal filed by the appellant before the Sessions Judge was incompetent. If the learned Magistrate had only awarded a sentence of fine, in that case revision alone would be competent and not an appeal but in the instant case the Magistrate not only awarded the fine of Rs. 100 but also directed the appellant to vacate the premises within two months from the date of the order. This part of the order presumably was passed under section 456 of the Criminal Procedure Code, and this made the order appealable and the High Court has gone wrong in holding that appeal filed by the appellant before the Sessions Judge was not maintainable.

**G**

**H**

There were certain other pleas taken by the respondent before the High Court but it is not necessary to refer to those pleas in the view that we have taken that on the complaint itself no offence under section 448 of the Indian Penal Code is made out.

For the foregoing discussion, the appeal must succeed. It is accordingly allowed. The judgment of the High Court dated 16th December, 1980 is set aside and that of the Court of Sessions is restored. The bail bond if any shall be cancelled.

S.R.

*Appeal allowed.*