

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.794 OF 1997

Dinesh Chandrikaprasad Phatak
Age 50 years, Occu. Agriculture
and business, R/o.Man,
Tal.Palghar, Dist.Thane
V/s.

... **Appellant**

The State of Maharashtra
(At the instance of Boisar
Police Station)

... **Respondent**

.....

Mr.S.V.Marwadi with Mr.Kartik Garg, Advocate for the Appellant
Mrs.A.A.Mane, APP for the Respondent/State.

....

CORAM : ABHAY M. THIPSAY J.

DATED : 15TH JUNE 2015

ORAL JUDGMENT :

1. This appeal is directed against the Judgment and Order dated 19/12/1997 delivered by the Additional Sessions Judge, Palghar convicting the appellant, who was the accused No. 2 in Sessions Case No.271 of 1996 (Original Sessions Case No.407 of 1991) of an offence punishable under Section 452 of the Indian Penal Code (In short 'IPC') and sentencing him to suffer Rigorous Imprisonment for one year and to pay a fine of Rs.500/-, in default to suffer Simple Imprisonment for six months. There was one more

accused: viz:- Ramesh Pathak (accused No.1) in the said case, but the learned Additional Sessions Judge acquitted him.

The appellant and the said accused No.1 were also charged of having committed an offence punishable under Section 395 of the IPC, but were acquitted of the said charge.

2. I have heard Mr.S.V.Marwadi the learned counsel for the appellant. I have heard Mrs..A.A.Mane, the learned Additional Public Prosecutor for the State. With the assistance of the learned counsel, I have gone through the entire evidence adduced during the trial and I have gone through the impugned Judgment.

3. The prosecution case, as put forth before the trial Court was to the effect that the First Informant Smt.Sheela was running a shop in the name and style of, 'Prabha General Stores'. One Tanaji Patil and one Bhaskar Sutar (PW5) were working in the said shop as servants. On 28/09/1990, when Sheela and her associate Avinash (PW2) were not in the shop, the appellant and the accused No.1 Ramesh came along with 10 to 11 persons, drove Tanaji and Bhaskar, who were in the shop, out, removed certain goods from the shop and took forcible possession of the shop by locking the same from outside. When Tanaji reported the matter to Sheela, she lodged a Report with the police on the basis of which a case in respect of offences punishable under Section 395 of the IPC and Section 452 of the IPC came to be recorded.

4. The prosecution examined six witnesses during the trial. The first witness is Sheela herself. The second witness is her associate Avinash. The third witness Prabhakar and the fourth witness Ajij are panchas in respect of the spot panchanama. None of them supported the case of the prosecution. Even otherwise, their evidence is not very relevant in the context of the facts of the prosecution case and the admitted position. The fifth witness is Bhaskar who, as aforesaid, was at the material time working in the shop of Sheela as a servant. He is the only person, who witnessed the actual incident and who speaks about it. The sixth witness is Dinkar Bagal, Sub-Inspector of Police, who was attached to Boisar Police Station, at the material time, and who has investigated into the alleged offences.

5. It is clear that Bhaskar (PW5) is the only witness in respect of the alleged incident and, therefore, his evidence assumes importance. The other person - who was said to be present in the shop - Tanaji could not be examined during trial, because he had passed away.

6. Bhaskar states that on the particular day, the appellant and others came to the shop and directed Bhaskar and Tanaji, who were present there, to leave the shop. Though Bhaskar and Tanaji were not ready to go out of the shop, the appellant drove them out of the shop. The appellant and the persons, who had come with

him, *removed articles from the shop* and then locked the door of the shop from outside. Bhaskar then went to Sheela and reported to her about the incident.

7. It is not necessary to discuss the evidence of the prosecution witnesses, in as much as, the matter can be decided on the basis of a more fundamental and legal aspect. That aspect is 'whether by taking the case of the prosecution as it is - and to the extent believed by the trial Court - it discloses commission of an offence punishable under Section 452 of the IPC' In other words, *whether acts of the appellant, as were held proved by the trial Court, do amount to an offence punishable under Section 452 of the IPC*, is the primary question that needs to be decided.

8. Before discussing this aspect of the matter, it must be clearly kept in mind that the story of the appellant and other accused having committed an offence punishable under section 395 of the IPC has not been believed by the trial Court. There is a bald assertion made by the prosecution that some articles from the shop were removed, but this assertion has rightly not been believed by the learned trial Judge. Bhaskar has not specified in his evidence what were the articles, which were allegedly removed. Dinkar Bagal, Investigating Officer has admitted in his evidence that no articles were actually recovered in the course of investigation from the appellant, or the other accused.

9. Once the story that the appellant and the other accused having removed any articles from the shop is disbelieved, as has done by the trial Court, the only question that remains is whether the appellant can be said to have committed an offence punishable under Section 452 of the IPC.

10. The offence punishable under Section 452 of the IPC is an aggravated form of 'house-trespass', which is defined in Section 442 of the IPC and is made punishable under Section 448 of the IPC. However, 'house-trespass' itself is an aggravated form of *criminal-trespass*, which has been defined under Section 441 of the IPC and which is punishable under Section 447 of the IPC. It is, therefore, obvious that before a person is held to be guilty of an offence punishable under Section 452 of the IPC, it must be shown that in the alleged trespass, all the elements of 'criminal-trespass' or 'house-trespass' were present.

11. Section 441 of the Indian Penal Code reads as under :

“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 intimidate, insult or annoy any such person, or with intent to commit an offence,
is said to commit “criminal trespass”.

12. It is clear that to constitute 'criminal trespass' the entry in the property in possession of another must be;

(i) with intent to commit an offence;

or

(ii) to intimidate, insult or annoy any person in possession of such property. It is trespass with the requisite intention, as mentioned in the said Section that would amount to 'criminal trespass'.

13. In the instant case, the alleged entry of the appellant in the shop was undoubtedly *for the purpose of taking possession of the shop premises*. There was no other object behind such entry. In fact, that is the case of the prosecution itself.

14. Unlawfully taking possession of the property in somebody else's possession, simplicitor, has not been made an offence punishable under the IPC, or any other law. Therefore, entry for taking possession of the property - even if unlawfully, or unauthorizedly - does not amount to entering into or upon the property 'to commit an offence'. It would be a case of 'civil trespass' as distinguished from 'criminal trespass'. It is significant that in its application to State of Orissa and State of Uttar Pradesh, Section 441 of the IPC has been amended, so as to include entry into, or remaining upon any property for the purpose of taking unauthorized possession of such property, as an ingredient of the

offence defined under Section 441 of the IPC and made punishable under Section 447 thereof. This itself shows that but for such an amendment, which has application in the aforesaid States only, an entry effected into any premises for the purpose of taking unauthorized possession thereof would not, by itself, amount to an offence of 'criminal trespass'.

15. In the instant case, there is no allegation that any hurt was caused to any of the inmates in the course of taking possession. As aforesaid, though there was an allegation that 'certain articles' from the shop were removed, the same has been held to be not proved by the trial Judge - and rightly so in my opinion.

16. The prosecution case itself was that the appellant and the other accused had entered into the shop for the purpose of taking unauthorized possession of the said shop. As a result of aforesaid discussion, it is clear that the same cannot amount to 'criminal trespass' and consequently, the appellant cannot be said to have committed an offence punishable under Section 452 of the IPC.

17. The Additional Sessions Judge did not consider, while holding the appellant guilty, as to what were the ingredients of an offence of 'criminal trespass' and 'house trespass'. He just assumed

that once the entry in the premises is proved, it would automatically amount 'house trespass'. This view was clearly contrary to law.

18. In view of the fact that the prosecution case - as believed by the trial Court - even if accepted in its entirety does not show that any offence punishable under Section 452 of the IPC was committed by the appellant, it is not necessary to discuss the reliability of the evidence that was adduced during the trial to establish its case.

19. The impugned Judgment being contrary to law, needs to be set aside.

20. The appeal is allowed.

21. The impugned Judgment and Order of conviction is set aside.

22. The appellant stands acquitted.

23. His bail bonds are discharged.

24. Fine, if paid, be refunded.

25. Appeal is disposed of accordingly.

(ABHAY M. THIPSAY J.)