

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 491 of 2005**

- Hori Lal, S/o Janak Ram Chandra, aged about 76 years, R/o Village Nangjhar Police Station Malkharoda, Dist. Janjgir-Champa [CG]

---- Appellant**Versus**

- State of Chhattisgarh Through Police Station, Malkharoda, Distt. Janjgir Champa (Chhattisgarh)

---- Respondent

For Appellant	:	Shri Afroz Khan, Advocate
For Respondent-State	:	Shri Rajendra Tripathi, PL for the State

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Anil Kumar Shukla

Order On Board By**Prashant Kumar Mishra, J****06/12/2016**

1. The core issues required to be considered in this criminal appeal are:-

(1) Whether a Kachcha hut could be treated as a building used for human dwelling or as a place for custody of property within the meaning of Section 436 IPC.

(2) Whether the offence would be attracted even in a case where the victim is not the owner of the land but the construction is made on encroached Government land.

(3) Whether offence under Section 3 (2) (v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities)

Act, 1989 (for short 'the Act, 1989') is made out when there is no evidence that such offence is committed on the ground that the victim belongs to a member of Scheduled Caste and Scheduled Tribe community.

2. The appellant has called in question his conviction and sentence under Section 436 IPC and Section 3 (2) (v) of the Act, 1989 and sentence of RI for 10 years with fine of Rs. 500/- and life imprisonment with fine of Rs.500/-, respectively.
3. Allegation against the appellant and acquitted co-accused Tijram is that at about 10 AM on 11.04.1999 they committed mischief by fire with intend to destroy the dwelling house (Kothar) of Kaushilya Bai (PW-1) and her husband Puraan Singh (PW-2), who belong to Gond Tribal Community.
4. Kaushilya Bai (PW-1) informed the police at about 12:30 hours on 11.04.1999 reduced to writing vide Rojnamchasanha No.391 (Ex-P-1) informing that since morning her husband had gone to another village for marriage invitation and she was working in a stone quarry. At about 7 am she came back to her house for having food and returned to attend her work at the stone quarry. When she was busy in the work, Bhukhau Satnami (PW-9) informed that her hut has caught fire. She went and saw that her house/hut was burning. After preliminary investigation Dehati Nalsi (Ex-P-3) was recorded at 18:40 hours on 13.04.1999 to the effect that during the interrogation witnesses Manoj (PW-4), Krishna (not examined) and Bainsingh (PW-5) informed that the appellant and one of his relative has committed the mischief by fire and has caused damage to the house belonging to the complainant. The FIR (Ex-P-7) was registered on similar allegations. After collecting the Caste Status Certificate of victim Kaushilya

Bai (PW-1) charge-sheet was filed under Section 436 IPC and under Section 3 (2) (V) of the Act, 1989.

5. Co-accused Tijram was initially arrested and sent for trial when he was identified in the TI Pared held on 08.08.1999, however, subsequently, he remained absconding, therefore, the trial was separated and continued against the present appellant only. On his arrest on 14.08.2013, Tijaram was sent for trial, however, by judgment dated 04.02.2015 he has been acquitted.
6. Assailing the conviction, Shri Afroz Khan, learned counsel for the appellant would submit that in the Rojnamchasanha the complainant states to derive information from Bhukhau Satnami (PW-9) whereas from other evidence it would appear that she was informed by other witnesses, therefore, the whole prosecution story is doubtful. He would further submit that the prosecution case is full of material contradictions and omissions. It is also argued that from the statement of Puraan Singh (PW-2) it would appear that the structure in question was constructed on encroached land, thus, it did not belong to the victim, therefore, offence under Section 436 IPC is not made out. He would also submit that the essential ingredients to attract punishment under Section 3 (2) (v) of the Act, 1989 is missing, therefore, the said conviction also deserves to be set aside.
7. Per contra, learned State counsel would support the impugned conviction and sentence on the plea that the victim being in possession of the house, the offence under Section 436 IPC is made out even if the structure is built on encroached land. He would also submit that minor contradictions and omissions need not be given weight and further that offence under Section 3 (2) (v) of the Act, 1989 is fully made out against the appellant.

8. To appreciate the rival submissions and in order to test the validity and correctness of the impugned conviction we have perused the entire record. In the Rojnamchsanha (Ex.P-1) the complainant Kaushilya Bai (PW-1) has alleged to receive information from Bhukhau Satnami. It is not the case of the prosecution at any subsequent stage that it was Manoj (PW-4) or Bainsingh (PW-5) who informed the complainant and not Bhukhau Satnami (PW-9). In her Court statement Kaushilya Bai (PW-1) and her husband Puraan Singh (PW-2) have fully supported the prosecution case. Kaushilya Bai (PW-1) has also stated that when she was on her way to the police station to lodge report, Manoj (PW-4) and Krishna (not examined) informed her about involvement of the appellant and his relative and this fact was informed to the police but she could not say as to why this was not mentioned in the Rojnamchasanha. Manoj Kumar (PW-4) is a young boy aged about 19 years. He has fully supported the prosecution by stating that he has seen the appellant entering the house of the complainant and thereafter coming out when the house had already caught fire. Bainsingh (PW-5) has supported the prosecution during examination-in-chief, however, in his cross-examination he has stated that he has not seen the appellant setting ablaze the house of the complainant, therefore, statement of this witness may not assist the prosecution. Despite his statement, the statement of three witnesses namely Kaushilya Bai (PW-1), Puraan Singh (PW-2) and Manoj Kumar (PW-4) are sufficient enough to hold that the prosecution has proved its case against the appellant beyond all reasonable doubts, insofar as, the offence under Section 436 IPC is concerned.
9. It has been urged very strenuously by learned counsel for the appellant that from the statement of Puraan Singh (PW-2) it is clear that the Kothar (grain yard) is constructed on encroached government land, therefore, offence

under Section 436 IPC is not made out. True it is that such statement has been made by Puraan Singh (PW-2), however, there is no material on record to draw inference that Kaushilya Bai (PW-1) & Puraan Singh (PW-2) were not in possession of the subject property or that it was built on encroached land by someone else.

10. Section 436 IPC speaks about committing mischief by fire to destruct any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property. It nowhere speaks about ownership of such place, therefore, if a person is in the possession of the place or the property, Section 436 IPC would be attracted and it is not necessary for the prosecution to prove that the victim was the lawful owner of the land on which the building or the dwelling unit was constructed.

11. In a country like ours, where sizable section of society is still living below the poverty line, giving any restricted meaning to the word building occurring in Section 436 IPC would defeat the very purpose and intent of the legislature. In the remote and interior places poor people live in thatched house and quite often they raise structure on government nazul or forest land, however, as long as the structure belongs to them and is used for human dwelling or for custody of property, it is wholly immaterial as to who owns the land. The language implied in Section 436 IPC nowhere suggests that the offence would be completed only when the subject structure or building is under the lawful ownership of the victim.

12. In the matter of **Rajoo and others Vs. State of Rajasthan**¹, the Rajasthan High Court has held thus in paragraph 15:-

“15.....I do not feel persuaded to agree

¹ 1977 CRLJ 837

with the contention of the learned counsel for the accused-appellants that even if the prosecution case is believed then also what has been proved is that the accused set fire to a thatched shade and as such the accused appellants cannot be held guilty under Section 436, I.P.C. The meaning of the word "building" cannot be restricted only to the constructions made with the help of materials generally used for constructing the 'pucca' structure. If such a narrow construction would be given then the courts would be met with a difficult situation wherein only the 'pucca' buildings of richer section of the society would be protected and the 'kachcha' structures of the huts used by poor persons would be found outside the purview of the protection of Section 436, I.P.C. The dominant intention of the legislature in framing Section 436, I.P.C. was to give protection to those buildings which are used as human dwellings or as places where the properties are stored for custody. The 'kachcha' 'Jhumpa' with a thatched roof closed by doors and shutters in which the grain and other articles were stored comes within the meaning of "building" given in Section 436, I.P.C. and can be very well termed to be a place for the custody of property. Poverty is no sin. A poor man with scanty means is bound to live in grass or mud huts and places whatever articles he has therein, not out of his own choice, but out of necessity, which he cannot help. For the reasons mentioned above, I am satisfied that the prosecution has been able to bring home the guilt to the accused-appellant Raju."

13. in the matter of **The State of Gujarat Vs. Vedva Vaghari Moti Nagji and another**² it has been held that any building which is ordinarily used as a place of worship or as a human dwelling or as a place for custody of property would come within the term building used under Section 436 IPC and is not necessary that only pucca structure would be termed as building.

14. In our considered view, if the argument raised by learned counsel for the appellant is accepted, it would defeat the rights of poor masses who live in Kuccha hut like structure, therefore, this part of the argument raised by learned counsel for the appellant deserves to be and is hereby rejected.

² 1973 CRLJ 148

15. It has also been argued that the offence under Section 3 (2) (v) of the Act, 1989 is not made out because the parties were known to each other and the offence is not committed only on the ground that the victim belongs to Tribal Community.

16. To appreciate the submission, it would be apt to bear in mind the provision contained in Section 3 (2) (V) of the Act, 1989. It says that, whoever, not being a member of a Schedule Caste or Schedule Tribe, commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property **on the ground** that such person is a member of Schedule Caste or a Schedule Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.

17. Thus, in order to attract the penal consequences, the offence under Section 3 (2) (v) of the Act, 1989 would be made out when the accused commits the offence under the Indian Penal Code, which is punishable for a term of 10 years or more, against a person or property on the ground that such person is a member of Schedule Caste and Schedule Tribe community or the property belongs to such member. Gravamen of the charge under this section is not only commission of offence but it should be committed on the ground that such person is a member of Schedule Caste and Schedule Tribe community. In other words, the prosecution must place on record reliable and cogent evidence that the offence was committed for the reason and on the ground that the victim belongs to Schedule Caste and Schedule Tribe community, otherwise if a person is convicted for an offence under IPC and again under Section 3 (2) (v) of the Act, 1989 without satisfaction of the requirement of Section 3 (2) (v) of the Act, 1989, it may be a case of double jeopardy. It will be an offence under the IPC and in addition under

Section 3 (2) (v) of the Act, 1989 when they are two separate and distinct offence and not only one offence for which a person is convicted twice because the victim belongs to Schedule Caste and Schedule Tribe community.

18. In taking the above view, we are fortified by the law laid down by the Supreme Court in the matter of **DINESH ALIAS BUDDHA vs. STATE OF RAJASTHAN**³, wherein the following has been held in para 15:-

“**15.** Sine qua non for application of Section 3 (2) (v) is that an offence must have been committed against a person on the ground that such person is a member of the Scheduled Castes or the Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not the case of the prosecution that the rape was committed on the victim since she was a member of a Scheduled Caste. In the absence of evidence to that effect, Section 3 (2) (v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.”

19. In view of the above, we are least hesitant to hold that the offence under Section 3 (2) (v) of the Act, 1989 is not made out against the appellant. He is acquitted of the said charge. At this stage learned counsel for the appellant would submit that on the date of commission of offence, the appellant was 76 years of age, therefore, his present age would be about 90 years. He has already undergone about 6 years of jail sentence, therefore, the sentence may be reduced to the period already undergone.

20. Considering the fact that the offence had taken place more than 17 years back; the present age of the appellant would be about 91-92 years and has already undergone about 6 years of jail sentence, ends of justice would be served if the period of jail sentence is reduced to the period already

³ 2006 (3) SCC 771

undergone.

21. Accordingly, the appeal stands allowed in part. The appellant is held guilty of committing offence under Section 436 IPC and is convicted for the said offence. He is acquitted of the charge under Section 3 (2) (v) of the Act, 1989. The sentence under Section 436 IPC is reduced to the period already undergone. The appellant is on bail Surety and personal bond earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A Cr.P.C. The appellant shall appear before the higher Court as and when directed.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Anil Kumar Shukla

Ashu