

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 785 OF 2004

The State of Maharashtra,
Through the Public Prosecutor,
High Court Bench at Aurangabad

.. Appellant

Versus

Suresh Ganpat Bhagwat,
Age 33 years, Occu. Labour work,
resident of Pathardi, Taluka Pathardi,
District Ahmednagar

.. Respondent

Mrs V.N. Patil, Jadhav, A.P.P. for appellant
Mr R.R. Karpe, Advocate for respondent

CORAM : A.M. DHAVAL, J.

DATE : 20.1.2018

ORAL JUDGMENT :

1. This appeal is by the State against the judgment of acquittal passed by learned 5th Ad hoc Additional Sessions Judge, Ahmednagar in Criminal Appeal No.58 of 2002, whereby the respondent herein was acquitted of the offence punishable under Section 447 of Indian Penal Code by setting aside the conviction recorded by learned Judicial Magistrate, First Class, Pathardi in Summary Criminal Case no.254/2000 under Section 447, by judgment dated 28.11.2002. The respondent was sentenced to simple imprisonment for one month and to pay fine of Rs.250/-, in default simple imprisonment for fifteen days.

2. The facts relevant for deciding this appeal may be stated as follows :

P.W.2 Ashok Bansod, on 16.7.2000 lodged F.I.R. at Pathardi police station. As per F.I.R. he was owner of plot No.1-C admeasuring 33x32 meters, having odd shape of total area of 763.75 square meters at Survey No.3/1 (old) and Survey No.9/1 (new) at Pathardi. It is near old S.T. Stand. According to the informant, the defendant was threatening him to disturb his possession. Hence, he filed R.C.C. No.202/1998 against him and had obtained relief of temporary injunction. The respondent herein in breach of said injunction order made encroachment and constructed a tapari/shed on his plot on 16.7.2000. On the basis of F.I.R., Crime was registered at C.R.No.I-136/2000 under Sections 447, 504, 506 of Indian Penal Code and the same was investigated into. After submission of charge-sheet, learned Judicial Magistrate, First Class, Pathardi framed the charge. The accused pleaded not guilty. The prosecution examined four witnesses. The learned Judicial Magistrate, First Class, Pathardi convicted the respondent under Section 447 of Indian Penal Code. The said order was challenged by way of appeal and the Sessions Judge allowed the appeal and acquitted the accused. Hence, this appeal.

3. Mrs V.N. Patil Jadhav, learned A.P.P. has taken me through the evidence on record and stated that the ownership and possession of the informant over plot No.1-C is not in dispute and is supported with documentary evidence in the form of 7/12 extract (Exh.23), certified copy of injunction, order in Civil Suit No.202/1998 (Exh.47) of Pathardi Court and copy of decree. She also relied on oral evidence and argued that the learned trial Judge has properly appreciated the evidence and learned Additional Sessions Judge should not have

interfered. The accused had no possession anywhere near the plot, still he constructed a shed thereon, which is not in dispute. The Civil Court has passed a decree directing him to remove the encroachment. Hence, the conviction under Section 447 of Indian Penal Code should be restored.

4. Per contra, Pratap Vikhe Patil, learned Advocate h/f Mr R.R. Karpe for the respondent supported the judgment of the appellate Court. He argued that in the present matter, the plaintiff failed to prove his possession over the plot on which the shed of accused is existing. In the alternative he submits that it is a civil dispute.

5. After hearing the learned Advocate and learned A.G.P. for the parties and on going through the evidence on record, the only point for my consideration with my finding is :

“Whether the prosecution has established criminal trespass by the accused on the land of the informant ?” In the negative.

- REASONS -

6. The evidence on record shows that P.W.2 Ashok Bansod had purchased the said land and has got registered sale deed in his name. The said plot is adjacent to the S.T. Stand, which is on the northern side. There is no dispute that the defendant is having his structure. According to the informant, it is on his land, whereas according to the accused, it is outside in the open space in between the plot and the road.

7. The informant's contention that on 16.7.2000 for the first time the accused brought construction material and constructed the shed is not acceptable. He had already filed suit for injunction. Besides, on 17.5.1999, the accused was served with notice under Maharashtra Regional Town Planning Act (Exh.39) for removal of his encroachment. It indicates that the accused was having his tin shed at the said place, atleast prior to 17.5.1999. It is also not possible that the tin shed could have been constructed by the accused in a single day. At the time of drawing spot panchnama, fully constructed tin shed was seen on the spot.

8. The crucial question is whether the land under the shed of the accused belong to the informant or not. In this regard, it must be stated that the informant has admitted that his plot was not fenced by boundary or wiring. He had sought such permission but there was no fencing.

9. In the light of specific defence raised by the respondent that his tin shed was on the open land not belonging to the informant, it was for the informant to show specifically the location of his northern boundary so as to show that tin shed was not outside the plot, but on his land. In this regard, there cannot be any oral evidence to prove the encroachment. The informant ought to have produced the following documents:

- (I) Copy of registered sale deed
- (II) Copy of village map
- (III) The boundaries shown in the sale deed
- (IV) Photographs
- (V) The 7/12 extracts etc of the property situated on the northern side and abutting to the plot no.1-C.

10. It was also necessary to get the said plot measured from a government measurer, who could have fixed the boundaries of the plot of the informant. No such documents are produced on record. The reliance on the decree of injunction and direction for removal of encroachment is not useful for the simple reason that the injunction order and direction is only in respect of structure on the suit plot. There is no finding that the construction of the defendant therein (the accused) was on the plot of the informant. In absence of such finding, it is always open to the accused even in the execution to take a stand that he has not made encroachment. The evidence on record shows that there was a civil dispute between the parties. The accused and three others had constructed the sheds and they were contending that those sheds were not on the plot of the informant. A suit was also filed by the informant in 1998 for injunction to protect the possession. In the light of all these facts, the learned Ad hoc Additional Sessions Judge rightly relied on **Manikchand Birdichand Sharma Vs. The State of Maharashtra 1975 Cr.L.J. 1044**, wherein it is observed :

“Act done or attempted to be done in bona fide assertion of a right, however, ill-founded in law, that right may

be, cannot amount to the offence of mischief within Section 425 of Indian Penal Code or the offence of Criminal trespass within Section 441 of the I.P.C.”

11. In order to prove the offence of criminal trespass, it was essential for the informant to show beyond reasonable doubt the location of his northern boundary. Since the prosecution has not filed above referred documents, the alleged criminal trespass is not proved beyond reasonable doubt.

12. It is clarified that the accused might have committed encroachment, but there is no proof before this Court to give a finding to that effect and the parties should not be permitted to rely on the observations in this judgment in other proceedings between them before the sub-ordinate Court as the observations are made for the purpose of deciding this proceeding only.

13. With these observations, I hold that the judgment of acquittal passed by the learned 5th Ad hoc Additional Sessions Judge, Ahmednagar is unassailable.

14. Hence, the appeal deserves to be dismissed and the same is accordingly dismissed.

(A.M. DHAVAL, J.)

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