

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 4238/2005 & Crl.M.A. 8659/2005**

% Date of reserve: 26.02.2009
Date of decision: 27.03.2009

S.S. JASPAL ...PETITIONER
Through: Mr. Sanjeev Mahajan, advocate

Versus

SAVITA GULATI & ANR. ...RESPONDENT
Through: Mr. Pramod Ahuja, advocate

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MOOL CHAND GARG, J.

1. The petitioner is aggrieved by an order passed by the Metropolitan Magistrate on 25.05.2005 dismissing his application under Section 245(2) Cr.P.C. filed after a period of more than 4 years of the summoning order dated 04.07.1997 on a complaint instituted by deceased Shakuntala Devi now represented by Shri T.S. Gulati Respondent No. 1.

2. The respondents had filed the said complaint against the petitioner and other accused persons including accused no. 1 & 2 on 07.12.1996 under Section 191/192/406/420/448 of IPC read with Section 34 thereof, along with Section 340 Cr.P.C. as accused no. 1 & 2 delivered the possession of the property to

accused 3 & 4 after delivering possession of the same to the respondents somewhere in May 1992 under an agreement to sell and executing the relevant documents in their favour duly registered with the office of the Sub-Registrar without the consent of the complainant.

3. In the complaint, it was also alleged that after the execution of the documents for consideration & inasmuch as the respondent having received a sum of Rs. 10,50,000/- out of total sale consideration of Rs. 11,50,000/- accused no. 1 & 2 namely, Shri Lalita Prasad and P.G. Satish delivered the possession of the property to her. The balance amount was agreed to be paid after installation of electricity connection and on payment of house tax arrears by those accused persons. As per the agreement even though the possession was given to the respondents, overall control of the property comprising of a plot no. E 98A measuring 98 sq. yds. Part of khasra no. 98 Khatoni 72/75 situated at Sainik Farm in the area of Saidulajab, tehsil Mehrauli New Delhi was kept with that of accused no. 1 & 2 but a chowkidar was appointed whose salary used to be paid by the complainant.

4. After the service of summons the petitioner moved an application under Section 245(2) Cr.P.C. for his discharge but the said application was not found favour by the Magistrate.

5. Some averments made by the respondents in her complaint are reproduced for the sake of reference:

2. That the accused 1 and 2 entered into an Agreement with the complainants dated 13th May, 1992, for a consideration of Rs. 11,50,000/- (Rupees eleven lacs and fifty thousand only). That by the said Receipt-cum-Agreement, the complainant paid Rs. 1,00,000/- (Rupees one lakh only) in cash and Rs. 50,000/- (Rupees fifty thousand only) by cheque. Copies of Receipts are enclosed herewith. That the deal was for plot bearing No. E-98A, measuring 975 sqp yds. (91x96.6) Part of khasra no. 98, khatoni 72/75, situated at Sainik Farm, in the area of village Saidlajab, Tehsil Mehrauli, New Delhi and the deal of said property was through Smt. Rashmi Wadhwa and Shri K.S. Gulati and Avtar Singh.

3. That the complainants no. 1 paid the whole consideration amount of Rs. 10,50,000/- (Rupees ten lacs fifty thousand only) but got the agreement in her name as well as in the name of her daughter-in-law i.e. complainant. That as mentioned above, different amounts were paid on different dates as mentioned above.

4. That here it is worthwhile to mention that complainants were to pay balance of Rs. 1,00,000/- (Rupees one lac only) to the accused 1 and 2 after installation of permanent electricity connection by them and payment of house tax arrears upto date of Sale Deed. As such the total transaction for the sale of plot with its superstructure was agreed for Rs. 11,50,000/- (Rupees eleven lacs and fifty thousand only) out of which as mentioned Rs. 10,50,000/- was paid by the complainant No. 1 to the accused. However, the accused 1 and 2, however, executed an Agreement for Rs. 3,55,000/- (Rupees three lacs and fifty five thousands) for their convenience and assured that after doing legal formalities like requisite permission from appropriate authority. He will execute proper Agreement to Sell for Rs. 11,50,000/- (Rupees eleven lacs and fifty thousand only) in favour of complainants.

5. That the accused 1 and 2 also took original General Power of Attorney, from the complainants, executed by the previous owner namely J.K. Goondli which was in their favour with the assurance the same will be returned within three months but did not return it despite of repeated visits and demands raised rather colluded with defendants 3 and 5 and executed wrong and contradictory affidavit just to cheat the plaintiffs badly.

6. That for his own convenience, the accused Nos. 1 and 2, executed the Agreement to Sell for Rs. 3,35,000/- (Rupees three lacs thirty five thousand only) vide the consideration amount was paid for Rs. 10,50,000/- (Rupees ten lacs and fifty thousand only) and promise the complainants that after getting appropriate permission, he will execute relevant agreement for Rs. 11,50,000/-.

7. That here it is worthwhile to mention that amount of Rs. 10,50,000/- (Rupees ten lacs fifty thousands only), the complainants paid Rs. 3,35,000/- (Rupees three lacs fifty five thousand) by cheque and balance amount by cash. However, got stamped receipts from accused for every payment. The details of the payments paid by

complainant No. 1 has duly been mentioned in the receipts mentioned in the above paras. The details of the cheque amount has duly been mentioned in the receipt dated 4th August, 1992.

16. That there was some litigation going on between the accused no.1 on the one hand and Shri Davinder Sharma, J.K. Goondli and Gurukul Fashion and Shri Yashpal and Mrs. Meera Jaiswal i.e. the present accused no.3 on the other hand. This fact of litigation was not known to the complainants and the accused no.1 entered into some compromise with the above mentioned persons and as per the compromise, the accused no.1 along with accused no.2 handed over the possession of the plot in question to the accused no. 3 and 4. This fact the complainants came to know only through the copies of documents filed by them with the Hon'ble Delhi High Court when the case was filed by the complainants for relief in March, 1996. The said compromise, the accused 1 & 2 entered with accused 3 & 4 after getting original Power of Attorney on some false pretext. The said power of attorney was executed by Shri J.K. Goondli, the earlier owner of the land in question in favour of accused 1 & 2 and the said original power of attorney is not being returned by the accused despite of repeated requests and demands raised by the complainants.

18. That accused 1 & 2 assured that they will be returning the Power of Attorney or will pay the balance or complainants can get sale deed through the process of the Court. That accused 1 & 2 paid Rs. 2,50,000/- on different dates as per compromise but the amount has been forfeited by the complainants. The accused 1 & 2 clearly stated in case the said amount is not paid, the complainants will be at liberty to get the sale deed executed in their favour and in that event the accused 1 and 2 will also get back the possession to the complainants from accused 3 and 4 by their own source or by compromise with the accused no.3 and 4. But accused 1 and 2 never fulfilled their promise and never got the possession nor executed relevant documents in favour of complainant nor got the permanent electricity in favour of complainants nor paid/cleared the House Tax arrears which was one of the performance which was to be completed by accused 1 and 2 nor paying the present market value of the said property as per undertaking-cum-Indemnity Bond dated 24th January, 1996, executed by them despite of repeated demands and requests.

20. That on 21st February, 1996, complainants came to know that the accused 1 & 2 are playing some mischief as they were neither returning the original G.P.A. of Shri Goondli nor divulging the facts rather handed over the possession to accused no. 3, without knowledge, consent and permission of complainants rather they exceeded their authority and misused the said Power of Attorney executed by Shri J.K. Goondli, in favour of accused 1 & 2 which was given to them in good faith. The complainants lodged report through Shri T.M. Gulati, who is the husband of complainant no. 2 and son of complainant no. 1. Copy of report lodged with the Police is enclosed herewith. The complainant and their

attorney have been given threatening calls from the accused and their associates. In fact on 21st February, 1996, when associates of complainants came to know of unauthorized construction being raised by accused 3 and 4 and their associates, report was lodged and thereafter on the same day i.e. on 21st February, 1996, S.H.O., Police Station, Mehrauli, directed the Police Officer, Shri Hans Raj, to see that no unauthorized construction is raised by the accused 3 & 4 but it was an eye-wash by the Police authorities. The complainant got photographs of the same day of unauthorized construction raised by accused. The complainants also have got photographs of 8th April, 1994, where the husband of the complainant no. 1 is also there with the complainants and the date of photographs itself is there of 8th August, 1994 which shows that the complainants were in possession of the property in question.

25. That after paying a sum of Rs. 10,50,000/-, the complainants got nothing, neither the possession nor the sale deed has been executed nor the permanent electricity connection was applied by the accused 1 & 2 in favour of the complainants. Rather the complainants have lost the possession because of collusion of accused with each other and without knowledge of the complainants.

31. That as the accused 1 and 2, executed relevant documents in favour of the complainants and have failed to deliver the possession in favour of the complainants rather gave possession without consent, knowledge and permission of the complainants to accused 3 and 4 being not only duped but defrauded them by their acts of concealment, calculated plans and forgery motives. The complainants have no other remedy except to approach to the Hon'ble Court for their grievances and redresses i.e. while filing suit for specific performance and possession.

34. That after taking forceful possession, the following illegal constructions have been raised by accused 3 and 4 and their associates. They have extended front portion from the drawing room side and have also extended kitchen. Rather the accused no. 5, in connivance with accused 6 and 7, have demolished the existing structure and have raised all unauthorized constructions on the property of the complainants. That the accused 3 to 7, have also have also removed the name of the complainants from gate though Adarsh Farm written by the complainant is still there.

41. That the accused 1 and 2 also took the original Power of Attorney from the complainants of Mr. Goondli and they assured that they will be returning the same but the said power of attorney was also not parted with to the complainants and that also amount to criminal breach of trust nor they returned the balance amount as promised by them nor handed over the possession, nor got the electricity connection, which was one of the condition of the Agreement, nor paid the House Tax, as such the accused cheated misrepresented and committed criminal breach of trust. As such are liable for prosecution under the provisions of Indian Penal Code.

6. On the basis of the aforesaid averments it was pleaded by the complainant that there was a clear cut admission made on behalf of the accused no. 1 & 2 that the possession of the property had been given by them to the complainant yet they also gave possession of the property to Mrs. Meera Jaswal and Shri R N Jaswal (accused no. 3 & 4) who have raised illegal construction on the said property with the help of accused no. 5 who is the petitioner in this case.

7. The Learned Metropolitan Magistrate passed the summoning order against the petitioner taking into consideration the averments made in the complaint and the evidence led by the respondents at the stage of pre-summoning and made the following observations:

a. Smt. Shakuntala Rani and Sangeet Gulati has filed the complaint against Lalita Prasad and 9 others. The allegations in brief are that accused no. 1 & 2 entered into one agreement with the complainants on 13.5.1992 regarding property no. E-98A, measuring 975 Sq. yds, part of khasra no. 98A at Sainik Farm in the area of Village Saidullajab Mehrauli. The deal was executed through brokers accused no. 8, 9 and 10. It is alleged that the accused no. 1 & 2 did not disclose the factum of pendency of suit filed by accused no. 1 on 21.3.1992 against 5 persons alleging that accused no. 1 and 2 had purchased this land from Shri J.K. Gondly, copy of which is exb.CW-2/A. The receipt-cum-agreement is exb.CW-1/1, the receipt is exb.CW1/1 bears the signatures of accused no. 2 and accused no. 10 Kartar Singh. The second agreement-cum receipt was executed on 19.5.92 which is exb. CW1/2 and the 3rd is exb. CW3/1 is dated 30.5.92 and thus a total sum of Rs. 50,000/- was receipt from the complainant by accused no. 1 and 2.

b. It is stated thereafter that on 14.6.92 the complainant got installed a jet pump vide receipt exb.CW1/4 and on 4.8.92 total payment was made to accused no. 1 and 2. The various documents executed by accused no. 1 and 2 are exb. CW1/2 to cW1/5. The complainant has also placed on record letters for change of telephone and for change of address. The photographs taken by the complainant are also placed on record.

c. It is further alleged that the possession of property was with the complainant which was being looked after by the complainant/s chowkidar who was living there and was being paid by the complainant but on the recommendation of accused no. 8,9 and 10, the accused no. 1 and 2 were allowed to sit on the property.

f. It is further stated that January 95, the accused no. 1 and 2 approached to the complainant and original GPA which was executed by J.K. Gondly was taken by them for the purposes of electricity and house tax. Further the accused no. 1 and 2 executed Indemnity Bond exb. CW1/19 and CW1/20. Further in January 95 itself, the accused no. 1 had filed an application under 0.23 Rule 1 exb. CW2/11 for compromise. This application was in collusion or connivance with accused no. 2 and the application was also supported by a false affidavit exb. CW2/12 and the application was for compromising the matter with accused no. 3 to 5 and a false application was fabricated and a false statement was made by accused no. 1 and possession was illegally given to accused no. 3 by accused no. 1 and 2.

g. It is deposed that the complainant came to know that accused no. 1 and 2 playing mischief and they did not return original GPA and nor gave true facts and rather entered the possession to accused no. 3 without knowledge and consent or the permission of the complainant and committed criminal breach of trust.

h. On 21.2.96 this complaint was lodged by complainant and it came to their knowledge that unauthorized construction was being raised by accused no. 3 and 4 and accused no. 5 in connivance with the accused no. 6 and 7 have demolished and have raised unauthorized construction on the property of the complainant.

i. The complainant Savita Gulati has appeared as CW1 and Ramesh Kumar, clerk from record room has appeared as CW2 and CW3 Prem Parkash Nagpal has also identified his signatures on several documents placed on record.

j. After hearing the complaint and Ld.counsel for the complainant and on the conspectus of entire material on record. I am of the considered view that a prima-facie case u/s 193/406/420 IPC is made out against accused no. 1 and 2. Further a prima facie case u/s. 193/406/420 IPC is made out against accused no. 1 and 2. Further a prima-facie u/s. 193/406/420 IPC r.w.s. 107 IPC is made out against accused no. 8,9 and 10 and offence u/s. 448 IPC is made out against accused no. 3 to 7 and there are sufficient grounds to proceed against the aforesaid accused persons.

Accordingly, all the accused be summoned for 5.8.97 on filing PF within 3 days.

8. However, it is submission of the petitioner that there is no allegation that either of the said accused persons have taken forcible possession from the respondent or her deceased mother.

What only transpires is that the possession was handed over by Shri Lalita Prasad and P.G. Satish i.e. accused no. 1 & 2 and therefore the offence of house trespass or criminal trespass as alleged by the complainant in her complaint would only arise against Shri Lalita Prasad and P.G. Satish and not against the petitioner.

9. It is also stated that the deceased mother of the first respondent has not cared to appear for the pre-summoning evidence whereas evidence has been led by the first respondent and one Prem Prakash Nagpal a record room Clerk. Those witnesses in their deposition have alleged that the possession of the property belonging to the second respondent and her deceased mother was illegally handed over to Mrs. Meera Jaswal accused no. 3 and Shri R.N. Jaswal and, thus, accused no. 4, 5, 7 are in illegal possession of the property and for that reason it is prayed that an order be passed restraining accused no. 3 & 4 and their agents/ servants in completing the construction and enable the possession by sub-letting the transfer in favour of anybody else as it is apprehended that otherwise the complainants will be deprived of their legal rights of getting sale deed in their favour and of getting possession.

10. The petitioner submits that from the complaint filed by the respondents and the evidence led by them the only allegation made is that accused no. 1&2 i.e. Shri Lalita Prasad and P.G.

Satish had given possession of the property in question to the complainant i.e. the first respondent but kept an overall control on the property by appointing one Chowkidar but whose salary was paid by the complainant and that the possession of the plot was also handed over by accused no. 2 to accused no. 3 & 4 and lastly that forcible possession has been taken by accused no. 3 & 4 along with their associates who has also raised illegal constructions and by extending front portion from the drawing room side and the kitchen.

11. It is thus submitted that the allegations made by the complainant against the petitioner is that the petitioner in connivance with accused no. 3 & 4 demolished the authorized construction and raised unauthorized construction on the property of the respondent/ complainant.

12. It is submitted that under Section 448 IPC to constitute an offence of criminal trespass the following ingredients are necessary:

- (i) Possession must be actual possession of the complainant, which includes the right to eject or exclude any other person from the property in question.
- (ii) That accused must have actually entered into the property in possession of the Complainant.
- (iii) The accused must have entered into or upon property in the possession of another with the intention to commit an offence or to intimidate insult or annoy any person in possession of such property.

13. However, the averments made in her complaint are:

Respondents Accused Nos. 1 and 2 gave possession to the complainant but kept the overall control on the

property and one chowkidar was also appointed by accused Nos. 1 and 2 but his salary was being paid by the Complainant. It has been further alleged that the accused No. 1 along with the accused No. 2 handed over the possession of the plot in question to the accused No. 3 and 4. Lastly it has been alleged that after taking forceful possession, illegal construction have been raised by the accused 3 and 4 and their associates. They have extended front portion from the drawing room side and have also extended kitchen. The only allegation against the present petitioner is that Petitioner No.1, in connivance with the Accused No. 6 & 7, have demolished the existing structure and have raised all unauthorized constructions on the property of the Respondent.

14. It is also stated that the defence of the petitioner is writ large in view of the averments made in the complaint and, therefore, the petitioner ought to have been discharged. The allegation against the petitioner to the extent that he along with accused no. 3 & 4 raised unauthorized and illegal construction would not constitute an offence of house trespass. With these averments the petitioner has asked for the following reliefs:

- (i) Call for the records of the Complaint Case No. 102/1 titled "Shakuntala Rani Vs. Lalita Prasad" and set aside the order dated 25.5.2005 passed by Shri Deepak Garg, Metropolitan Magistrate New Delhi.
- (ii) Allow the application of the Petitioner under Section 245 of the Criminal Procedure Code and discharge the Petitioner from the charge under Section 448 of the Indian Penal Code.
- (iii) Pass such other or further orders as this Hon'ble Court may deem just and proper in the facts and circumstances of the case and in the interest of justice.

15. The respondents have contested the petition and have filed their written submissions. According to them the application filed by the petitioner under Section 245(2) Cr.P.C. was rightly dismissed by the learned Metropolitan Magistrate as it was moved after a period of 4 years of the summoning order which was never challenged by the petitioner and, thus, was barred by

limitation. It was also stated that it was categorically averred by the respondents that the possession of the suit property was handed over by the accused no. 1 & 2 to the petitioner at the time of execution of the agreement somewhere in 1992 & also delivered the possession of the property to them & executed relevant documents in their favour which were also registered with the office of Sub-Registrar. However, it was also not disclosed that there was any dispute between the respondents no. 1 & 2 with any other party. They did not even inform that any matter is pending in the High Court or that there was any possibility of taking over the possession of the property.

16. Thus, it is submitted that once the possession of the property was given by the respondents to accused no. 1 & 2 the question of giving possession by them to accused no. 3 & 4 and their raising over any construction over the property with the active connivance with the petitioner tantamount to an act of criminal trespass in the property of the petitioner, and therefore, they were rightly summoned. In so far as the defence of the petitioner, that he has no concern with the acts of respondents no. 3 & 4 or transfer of possession by accused no. 3 & 4 and transfer of possession by accused no. 1 & 2 to accused no. 3 & 4 are concerned, it would be a matter of evidence.

17. It is submitted that there is an admission by the accused persons in Para 4 of the application filed by the petitioner no. 5

that accused no. 1 & 2 gave possession of the property to the complainant but kept overall control of the property and one Chowkidar was also appointed but his salary was being paid by the complainant.

18. Taking into consideration the definition of criminal trespass as defined under Section 441 IPC the petitioner along with respondents no. 3 & 4 have entered into the property belonging to the complainant which are now been occupied by the accused persons without the consent of the respondents and, thus, makes out a case of criminal trespass. They are not only staying there but are also raising construction with intent thereby to intimidate, insult and annoy the complainant i.e. the respondents no. 1 & 2.

19. Taking all the facts into consideration, I am satisfied that there was no infirmity in the order passed by the Magistrate either in summoning the petitioner or dismissing his application under Section 245(2) Cr.P.C. in the facts of this case. Thus, it is not a case where any interference is required to be made by this Court under Section 245(2) Cr.P.C. Accordingly, the petition is dismissed.

Crl.M.A. 8659/2005

In view of the orders passed in the aforesaid, the application also stands disposed of.

MOOL CHAND GARG, J.

March 27, 2009
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