

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

Judgment reserved on: March 14, 2011
Judgment delivered on: March 22, 2011

+ **CRL.M.C. No.2556/2010 & CRL.M.A. No.13511/2010**

PAWAN KUMAR JAIN

....PETITIONER

Through: Mr. M.R.Chawla, Advocate with
Mr. Gaurav Kaushik, Advocate and
Mr. Tushar Singh, Advocate.

Versus

STATE & ANOTHER

....RESPONDENTS

Through: Mr.Sunil Sharma, APP for R-1.
Mr.M.P.S.Kasana, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. This is a petition under Section 482 Cr.P.C. filed by the petitioner Pawan Kumar Jain seeking quashing of the order dated 21.12.2005 passed by the learned Metropolitan Magistrate, Delhi in complaint case No.36/1 P.S. Roop Nagar, Delhi titled "Naresh Kumar Aggarwal Vs. Pawan Kumar Jain & Anr," whereby the petitioner and his co-accused

were summoned to face trial for the offences under Section 420/467/468/471/34 IPC in the complaint filed by respondent No.2.

2. Briefly stated, facts relevant for the disposal of this petition are that the complainant Naresh Kumar Aggarwal, Devender Kumar Mittal and his wife Kamini Mittal (since deceased) were co-owners of a property at Mussoorie in Uttaranchal. The parties thereafter formed a company M/s. Kumari Hotel Pvt. Ltd. It is stated that later on disputes arose between the parties which resulted in filing of civil suit as well as the proceedings before Company Law Board. The dispute between the parties under Companies Act, 1956 came up before this Court and by an order dated 24.05.1996, the learned Single Judge of this Court dismissed the petition filed by respondent/complainant for winding up of the company. The Division Bench of this Court by an order dated 25.05.2001 confirmed that order.

3. Respondent No.2 (complainant) in his above noted complaint titled "Naresh Kumar Aggarwal Vs. Pawan Kumar Jain & Anr," claimed that since he was finding it difficult to manage the property at Mussoorie, he appointed the petitioner Pawan Kumar Jain as a General Attorney vide General Power of Attorney (GPA) dated 03.12.2001. He, however, subsequently revoked the GPA within a month thereafter on 08.01.2002. When the complainant/respondent No.2 visited the property at Mussoorie in the first week of October, 2004, he learnt that the petitioner Pawan Kumar Jain had, in active collusion with Devender

Kumar Mittal, sold the share of respondent No.2/complainant to him by executing a sale deed in favour of Devender Kumar Mittal on the basis of GPA dated 03.12.2001 by concealing the fact that it had been revoked. It was also claimed by respondent No.2 in his complaint that once the General Power of Attorney executed in favour of the petitioner was revoked on 08.01.2002, the petitioner was left with no right or power to sell or transfer the share of the complainant and also that there was no occasion for the complainant to sell his share to Devender Kumar Mittal as a civil suit in respect of same property was pending adjudication, particularly in view of the restriction imposed under Section 52 of the Transfer of Property Act, 1982. On the aforesaid allegations, it was claimed that the petitioner, in conspiracy with his co-accused Devender Kumar Mittal, is liable to be prosecuted for the offences punishable under Section 465, 467, 468 and 471 read with Section 34 IPC.

4. Learned Metropolitan Magistrate, on consideration of the complaint and the preliminary evidence led by the respondent (complainant) in inquiry found that the complainant/respondent No.2 was successful in making out a prima facie case justifying summoning of the petitioner and his co-accused for the offences punishable under Section 420, 467, 468 and 471 read with Section 34 IPC and he accordingly summoned the petitioner and his co-accused.

5. Feeling aggrieved by the aforesaid summoning order, Devender Kumar Mittal, co-accused of the petitioner filed a petition being Crl.M.C. No.1857/2006 in the High Court for quashing of summoning order against him. His petition was dismissed by learned Single Judge of this Court by an order dated 08.02.2008. Devender Kumar Mittal filed an SLP against the order of learned Single Judge and the Supreme Court vide order dated 09.02.2010 allowed the appeal filed by Devender Kumar Mittal and quashed the criminal proceedings against him on the basis of aforesaid complaint. While parting with the appeal, the Supreme Court, inter alia, observed thus:

“We, however, make it clear that we have not expressed any opinion, whatsoever, so far as the allegations levelled in the complaint against the third respondent. The complaint so far as the third respondent/accused no.1 is concerned the same is required to be dealt with in accordance with law on its own merits uninfluenced by the observations made in this order.”

6. Learned counsel for the petitioner submits that foundation of the complainant's case rests on the General Power of Attorney executed by the complainant in favour of the petitioner which was undisputedly a registered document. He submits that since GPA was a registered document, it can be cancelled only by a registered instrument, which is not the case as per the complaint. Therefore, there can be no illegality in the petitioner executing sale deed on behalf of the complainant/respondent No.2 in favour of his co-accused Devender Kumar Mittal. In support of this contention, counsel for the petitioner

has referred to the judgment of Supreme Court in **Chandrakant Shankarrao Machale Vs. Parubai Bhairu Mohite(Dead)**, (2008) 6 SCC 745. In the said matter, the Supreme Court, while dealing with the issue of alteration in the terms of the mortgage deed by way of an unregistered deed of lease between the parties held that since the deed of mortgage was registered, its terms could not have been varied or altered by way of an unregistered document so as to change the status of the party from a mortgagee to a lessee.

7. Learned counsel for the petitioner also relied upon the judgment in **S. Saktivel(Dead) Vs. M. Venugopal Pillai & Others**, (2000) 7 SCC 104 wherein the Supreme Court with reference to Section 92 proviso (4) of the Indian Evidence Act held thus:

“6. In sum and substance what proviso (4) to Section 92 provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is oral, in such situations it is always open to the parties to the contract to modify its terms and even substitute by a new oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let in to prove that the earlier contract or agreement has been modified or substituted by a new oral agreement. Where under law a contract or disposition is required to be in writing and the same has been reduced to writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or

substituted. There is another reason why the defendant-appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the appellant, is allowed to be substantiated by parol evidence, it would mean rewriting of Ext. A-1 and, therefore, no parol evidence is permissible."

8. I have perused the above referred judgments. In the said judgments, the Supreme Court has held that if a right is created in favour of a party by virtue of a registered document, said right cannot be extinguished, modified or altered by an oral contract or an unregistered document. The facts in this case are distinguishable. This case relates to cancellation of a registered General Power of Attorney by the Principal without executing a registered cancellation/revocation deed. The question is whether this is permissible under law? Answer to this question lies in the fact whether or not, a General Power of Attorney creates a right in favour of a person who has been constituted as a Attorney on behalf of the Executor of GPA. It is not the case of the petitioner that the General Power of Attorney was executed in his favour for some consideration, nor there is any clause in the General Power of Attorney restricting the right of respondent No. 2 (Executor) of GPA to revoke the Attorney executed in favour of the petitioner. On reading of the copy of the GPA annexed to the petition, it is evident that this document was executed

without consideration and by virtue of this document, respondent No. 2 appointed the petitioner as his authorized attorney to do certain acts on his behalf as detailed in the GPA. Thus, the General Power of Attorney only created an agency in favour of the petitioner and authorized him to act on behalf of the Principal i.e. respondent No. 2 and by virtue of the General Power of Attorney, respondent No. 2 extended a promise to anyone dealing with the petitioner in terms of GPA that he would ratify the act of the petitioner. Thus, qua the public at large, the GPA in question could be cancelled only through a registered document. This however, is not true in case of the petitioner, who had not acquired any right under the GPA. Therefore, respondent No.2 being the Principal had every right to cancel or revoke the authority of the petitioner to act on his behalf pursuant to the registered GPA and this could be done orally or through an unregistered document/communication. Once aforesaid option was exercised by the respondent No. 2, the petitioner had no authority whatsoever to act on behalf of the respondent No. 2 as the GPA by no means, had conferred a personal right on the petitioner. Thus, this court is of the view that once respondent No. 2/complainant had cancelled the Power of Attorney executed in favour of the petitioner, petitioner had no right to act as his Attorney on the strength of above noted GPA. Since the petitioner has acted on the GPA after cancellation by respondent No. 2 and executed a sale deed in favour of Devender Kumar Mittal by concealing the fact of cancellation of GPA,

he has prima facie, committed the offence of cheating. In the instant case, even the Sub-Registrar who registered the document has been prima facie, cheated for the reason that had it been disclosed to him that the GPA has been cancelled by respondent No. 2, he would not have registered the sale deed executed by the petitioner on behalf of the respondent No. 2.

9. Learned counsel for the petitioner has further submitted that admittedly, a civil litigation between the parties was going on in respect of the property in question. Therefore, the sale of share of respondent No. 2 in the property by the petitioner as General Power of Attorney of respondent No. 2 to Devender Kumar Mittal is hit by the doctrine of *lis pendens* as laid down in Section 52 of the Transfer of Property Act. In view of this, it is urged that no cause for prosecuting the petitioner under Section 420/468/471 IPC is prima facie made out.

10. There is no merit in this contention. Section 52 of the Transfer of Property Act provides a bar upon the parties to a litigation involving any right to immovable property, to transfer or otherwise deal with such immovable property in a manner so as to affect the rights of any other person thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. This Section is basically specific to the civil dispute as to the right to property but it cannot be taken as a defence to wriggle out of a criminal offence by stating that the transaction involved transfer of

property which is prohibited by Section 52 of the Transfer of Property Act. The core issue for consideration is whether the petitioner has prima facie, committed the offence under Sections 420,468 & 471 IPC for which, he has been summoned by the Metropolitan Magistrate vide impugned order dated 21.12.2005.

11. In view of the discussion above, it is prima facie evident that the petitioner had entered into a transaction of sale of share of respondent No. 2 in the property at Mussoorie representing himself to be his authorized attorney, despite of the fact, prima facie, General Power of Attorney executed in his favour was revoked by the author i.e. respondent no. 2. Thus, by concealing the aforesaid fact of cancellation of his Power of Attorney, he not only induced Devender Kumar Mittal to enter into transaction of sale but he also cheated the Sub-Registrar by falsely misrepresenting that he was duly authorized attorney of respondent No. 2 which led him to accept the document of sale and register it. Thus, prima facie, he has committed an offence under Section 420 IPC. It is alleged in the complaint that petitioner has not even handed over the sale proceeds of the aforesaid transaction to the respondent No. 2 and misappropriated the same. Thus, he also prima facie, committed offence under Section 406 IPC. As per the material on record, the petitioner has also prima facie used the aforesaid General Power of Attorney, which was purportedly cancelled by the respondent No. 2 as genuine for the purpose of registration of sale deed in favour of Devender Kumar Mittal, therefore, a prima facie

offence under Section 471 IPC is also disclosed against the petitioner. The offence under Section 468 IPC is however not made out because admittedly, the General Power of Attorney was executed and got registered by the complainant.

12. It is further contended on behalf of the petitioner that admittedly, there is a long pending civil litigation going on between the parties in respect of the property in question. Thus, it is apparent that dispute between the parties is of civil nature and respondent No. 2 (complainant) has tried to give it a colour of criminal offence with a view to harass the petitioner and wriggle out of the transaction of sale of his share in favour of Devender Kumar Mittal.

13. I do not find merit in this contention. Law is fairly well settled that criminal and civil dispute out of a same set of transactions between the parties can proceed simultaneously and pendency of civil litigation between the parties cannot come in the way of criminal trial if the transaction alleged constitutes a criminal offence.

14. In view of the discussions above, the complaint filed by respondent No.2 and the pre-summoning evidence do disclose commission of offences punishable under Section 420/ 406/471 IPC by the petitioner. However, offence under Section 468 IPC is not made out. Thus, I find no reason to quash the summoning order dated 21.12.2005. However, the order is modified to the extent that offence

under Section 468 IPC is dropped and the offence under Section 406 IPC is added in the summoning order.

15. Petition is disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

MARCH 22, 2011
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