

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

Judgment Reserved on: September 26, 2016

% *Judgment Delivered on: October 20, 2016*

+ **CRL.REV.P. 164/2015 & CrI.M.A. 4115/2015**

NOOR FATMA

..... Petitioner

Represented by: Mr. R.N. Mishra, Adv.

versus

THE STATE GOVT NCT OF DELHI & ORS

..... Respondent

Represented by: Mr. Amit Ahlawat, APP.

Mr. Nasimuddin, Adv. for
R-2 to 11.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present revision petition, the Petitioner seeks setting aside of the order dated 21st November, 2014 passed by the learned Additional Sessions Judge discharging respondents 2 to 11 from the offence punishable under Section 395 IPC.

2. Factual matrix of the case is that on 1st June, 2013, a PCR call was received which was recorded vide DD No. 30A stating about a quarrel and the same was assigned to SI Mukesh. In the meantime, the petitioner came to the police station and alleged that her landlord had thrown her household articles on the street. SI Mukesh along with Ct. Budh Prakash reached the place of incident i.e. House No. B-113, Gali No. 6, Chand Bagh, Delhi and found the articles of the petitioner lying on the street. FIR No. 229/2013 was registered at PS Gokal Puri under Sections 354/356/380/342/323/452/506/34/120B on the basis of the written complaint by the petitioner

wherein she stated that on 1st June, 2013, when she was sitting in her house, her landlord Zahir along with his son, elder brother and one more person, entered the house and threatened her to leave the house otherwise she would be gang raped by them. When she requested three months time, Zahir, his elder brother, his son and the other person tore her clothes and started molesting her. In the meantime, the landlady, Gulshan came there along with her daughter in law and her two daughters, her sister and three daughters of Zahir and Jaitun and started beating the petitioner. They asked the petitioner to vacate the house and started throwing her articles on the street. In the meantime, some more people joined them and threw her household goods. She further stated that the daughter of brother of Zahir snatched her cell phone and handed it over to Zahir's daughter. She also stated there were ₹50,000/- lying under the bed and she suspected that Gulshan, her daughter in law and Zahir have taken the amount.

3. Since charge sheet was filed for offences punishable under Section 395 IPC as well, the case was committed to the Court of learned Additional Sessions Judge who vide the impugned order dated 21st November, 2014 came to the conclusion that from the statement of the witnesses it was not evident that common object of unlawful assembly was to steal ₹50,000/- or snatch the mobile phone, hence Section 395 IPC was not made out and rather Section 392 IPC was attracted. Since the offence punishable under Section 392 IPC and the other offences for which charge sheet was filed were triable by the Court of learned Metropolitan Magistrate, discharging respondent Nos. 2 to 11 for offence punishable under Section 395 IPC, the matter was sent back for framing of charge and trial to the Metropolitan Magistrate. Hence the present petition.

4. Learned Counsel for the Petitioner contends that the learned Additional Sessions Judge failed to appreciate the fact that the act of snatching the mobile phone and stealing of ₹50,000/- constitute the ingredients of offence punishable under Section 395 IPC. The above mentioned acts were in furtherance with the common object of the respondents thus attracting Section 149 IPC.

5. Per contra learned APP for the State submits that the impugned order suffers from no illegality as snatching of mobile phone and stealing of money were stand alone acts and not in furtherance with the common object of the unlawful assembly of the respondents.

6. The short issue before this Court is that whether the acts fall within the ambit of offence punishable under Section 395 IPC with the aid of Section 149 IPC. The Apex Court in the decision reported as State of Maharashtra v. Kashirao, (2003) 10 SCC 434 while dealing with the applicability of Section 149 IPC observed:

“11. The important question is as to the applicability of Section 149 IPC to the facts of the case.

12. A plea which was emphasized by the respondents relates to the question whether Section 149 IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in

Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object", as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

13. "Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and the language of the members composing it, and from a

consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one come into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot eo instanti.

14. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is

shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See Chikkarange Gowda v. State of Mysore [AIR 1956 SC 731 : 1956 Cri LJ 1365] .)

7. The act of snatching the mobile phone and stealing of ₹50,000/- were two stand alone acts allegedly done by daughter of Zahir's brother and Gulshan, his wife and Zahir. In so far as the application of Section 149 IPC is concerned, the necessary ingredient to constitute an offence with the aid

of Section 149 IPC is common object. Mere presence of the respondents cannot be inferred to mean that they came as an unlawful assembly for snatching the phone and stealing the money. It cannot be contemplated from the statement of the complainant that the members of the unlawful assembly knew that some of them were likely to commit dacoity as punishable under Section 395 IPC. Thus, it cannot be said that there was common object of the unlawful assembly to commit these two acts thus the learned Additional Sessions Judge rightly held that Section 395 IPC cannot be invoked as these two stand alone acts were allegedly committed by less than five persons.

8. Thus, I find no reason to interfere with impugned order passed by the learned Additional Sessions Judge. The revision petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

OCTOBER 20, 2016
'ga'