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

+ **Date of Decision: 15.02.2017**

% **W.P.(CRL) 804/2016 and CrI.M.A. Nos. 4399 & 5015/2016**

SUBHAJIT BANERJEE

..... Petitioner

Through: Mr. Ajayinder Sangwan, Tarunesh Kumar, Rishina Parashar, Narendera Singh, Rohan Sharma, Irfan Firdous, V.P. Singh, Kunal Chopra, Anirudha Kumar and Sweety, Advocates

versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Mr. R.S. Kundu, ASC with Mr. Ankit Kr Gulia, Adv. with SI Vikas Kumar, PS Bindapur

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

VIPIN SANGHI, J. (OPEN COURT)

1. The petitioner has preferred the present writ petition to seek the quashing of FIR 1250/2015 registered under Section 380 IPC at PS Bindapur and the proceedings arising therefrom. The petitioner also seeks the quashing of the order dated 11.01.2016 passed by the learned MM, Dwarka Courts in the said case, whereby NBWs were issued against the petitioner/ accused.

2. The background facts may be noted. The aforesaid FIR has been registered on the complaint made by the petitioner's wife. The petitioner and respondent No.2 (as per amended memo of parties) were married on 16.01.2012 at Kolkata. The petitioner and the complainant jointly purchased the property bearing no.U-66, Subash Park, Uttam Nagar on 18.11.2013. A copy of the sale deed has been placed on record, which is in the joint names of the petitioner and respondent No.2.

3. It appears that matrimonial disputes arose between the parties. The petitioner states that respondent No.2/ complainant without informing him left the matrimonial home along with her parents by taking all her belongings, gold ornaments, gifts of the petitioner and grocery articles on 11.07.2015. The petitioner lodged a complaint with PS Bindapur vide DD 14A in this respect. Respondent No.2 filed a divorce petition vide Mat No.239/2015 sometime in August 2015 before the District Judge, Sealda, West Bengal under Section 27 of the Special Marriage Act.

4. The petitioner claims that on 08.08.2015, the complainant came to the house of the petitioner and abused him and also threatened the petitioner to file a complaint under Section 498A IPC. The petitioner reported the said threat to the local police vide DD 35A. On 31.08.2015, the petitioner intimated PS Bindapur that he is shifting from Delhi to another city and hence he is locking the flat at Uttam Nagar while taking away all his belongings via Movers and Packers.

5. On 02.09.2015, respondent No.2 filed the complaint in question on which FIR 1250/2015 was registered at PS Bindapur under Section 380 IPC. The allegations made by the complainant in the said FIR read as follows:

“Dear Sir, request you to please take immediate action against my husband Mr. Subhajit Banerjee resident of U-66, Subhash Park, 2nd Floor, New Delhi-110059, I have filed the matrimonial suit for the dissolution of marriage in West Bengal Kolkata. Today, when I returned back from office, I found that he had locked the iron door, (new lock) somehow I managed to break the lock with the help of a mechanic and when went inside, I found that all my belongings i.e. bed, cloths, almirah, documents, pan, passport, jewellery, washing machine, oven, microwave, all educational certificates, fridge, dressing table, inverter, gas geyser, AC, Fan, lights, sandals, everything from head to toe has been stolen. I don't have a single cloth to wear, signed cheques of my father and me. He has theft, robbed everything, broken my room lock. I am alone here in Delhi and till Saturday 29th August, 2015 everything was in place. On Sunday I was at my friends place as he threatened me of life. I called my parents and they are supposed to come on 1st September, 2015. I have lodged many complaints, have done medical also as I was very badly beaten by him even if he has informed the police station for his departure to the P.S. who has given him the authority to break my room lock and take all and belonging without information. Request you to please take strict action immediately. Please initiate the proceedings against Subhajit upon treating this complaint as a FIR against him. Husband Mr. Subhajit Banerjee s/o Shanti Banerjee, 7838356967. Thanking you, Doyel Chakraborty 7838293608, U-66, Subhash Park, 2nd Floor, Near Shukar Bazar Chowk, Delhi-59”.

6. The submission of learned counsel for the petitioner is that on a reading of the FIR, no offence under Section 380 IPC is made out against the petitioner. This is for the reason that the premises in question was jointly owned and possessed by the petitioner and respondent No.2 as husband and wife. The complainant had left the matrimonial house for Kolkata with her parents and this fact was even reported to the local police station vide DD 14A dated 11.07.2015, wherein the petitioner had stated that

“3 days ago my wife Doyel Chakraborty and her parents (Bandana Chakraborty (Nandi) and Debaprasadh Chakraborty) leave my house. Initially I was not aware of the fact but I then called her and she informed me the same”. He also disclosed that some gold ornaments and grocery articles were found missing from the house.

7. The petitioner further submits that since he had to relocate to Kolkata, on 31.08.2015, he gave prior intimation to the in-charge at PS Uttam Nagar, and moved out of the said premises with all the belongings in the house through Movers and Packers.

8. Learned counsel for the petitioner submits that since the parties were in joint possession of the flat and were living together till the complainant had left the premises for Kolkata with her parents, the petitioner had bonafide removed all the articles through Movers and Packers after prior intimation to the police. It is submitted that in these circumstances, the petitioner could not be stated to have committed ‘theft’ as defined in section 378 IPC. Section 378 IPC read as follows:

“378. Theft.—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft”.

9. Learned counsel for the petitioner submits that to constitute the offence of theft, the taking of movable property has firstly to be with a dishonest intention. Secondly, the taking has to be *“out of the possession of any person without that person’s consent”*.

10. Learned counsel for the petitioner submits that in the present case, no dishonest intention can be gathered, considering the fact that the articles in

the house were removed to Kolkata after prior intimation to the local police station through Movers and Packers. Moreover, the possession of the movable properties removed by the petitioner was joint of the petitioner and respondent No.2, since all the movable properties were lying in the house jointly owned and occupied by the petitioner and respondent No.2.

11. In support of his submission, learned counsel for the petitioner has sought to place reliance on several decisions:

- i) *Neelam & Ors. v. State*, (1988) 34 DLT 152;
- ii) *Harmanpreet Singh Ahluwalia & Ors. v. State of Punjab & Ors.*, JT 2009 (6) SC 375; and
- iii) *Neeru Sharma v. State*, 2011 SCC Online Del 2044.

12. Learned counsel for the petitioner further submits that in the matrimonial proceedings, the petitioner has already returned practically all the articles that the complainant had laid a claim to, which had been transported through Movers and Packers by the petitioner from Delhi to Kolkata. The list of articles returned has been placed on record.

13. On the other hand, Mr. Kundu submits that on a reading of the FIR, the offence is made out inasmuch, as, the complainant has specifically stated that “*he has theft, robbed everything, broken my room lock*”. He submits that the petitioner has not joined the investigation and the stage is not ripe for this court to interfere in the present petition.

14. Mr. Kundu further submits that the petitioner has, during the pendency of these proceedings, also returned the passport and other documents of the complainant which also evidence the dishonest intention

of the petitioner/accused to commit theft. Else, the documents belonging to the complainant would not have been taken away by the petitioner.

15. Respondent No.2/ complainant has been appearing in these proceedings as would be evident from the order sheets. However, today respondent No.2 has not appeared either in person, or through counsel to oppose the present petition.

16. Having heard learned counsel for the petitioner and the learned ASC, perused the record and considered the aforesaid decisions relied upon by the petitioner, I am of the view that there is merit in the present petition and on a reading of the FIR, no offence is made out against the petitioner under Section 380 IPC. The fact that the premises in question was in joint ownership and possession is evident from the copy of the title deed placed on record. In the complaint/ FIR, the complainant does not claim to have been in exclusive possession of the said property. She does not even claim that the petitioner was not residing at the said property at the relevant time when the alleged theft took place. It is, therefore, evident that the petitioner was in joint possession of the aforesaid residential premises along with the complainant.

17. There is merit in the submission of learned counsel for the petitioner that to constitute “theft”, the dishonest intention should inhere in the accused. If the accused does not have the dishonest intention, but bonafide takes away the movable property out of the possession of any person without that persons consent, the offence of theft would not be made out. The State has not denied the fact that the petitioner had informed on 31.08.2015 the in-charge of PS Bindapur that the complainant had left the

house and taken away all her belongings without any intimation and without disclosing her whereabouts. He had also informed that she had filed a divorce case in the court of the District Judge, Sealda, Kolkata, West Bengal. He had informed that he had to relocate to another city for his job and that he is taking away all his belongings via Movers and Packers and locking the entire flat. The petitioner had, thus, upfront, acted bonafide and before removing the movable properties and assets from the said flat, he had informed his intention to do so to the local police. In these circumstances, the dishonest intention of the petitioner in taking away the movable assets and properties from the said flat is negated.

18. The other aspect of the matter is as to whether it could be said that the movable properties lying in the aforesaid premises were in the exclusive possession of the complainant. Since the petitioner and the complainant are husband and wife, and were living in the said premises despite their differences at the relevant time, it could not be said that the possession over the movable properties, assets and goods lying in the said premises was exclusively that of the complainant. In a matrimonial household, all articles would, normally, be in the joint possession of the couple. That possession would not change merely because there may be a discord between the two. Pertinently, in her complaint, the complainant does not particularise any article that she was in exclusive possession of, such that the petitioner had no access to it. She states that she found “*that all my belongings i.e. bed, cloths, almirah, documents, pan, passport, jewellery, washing machine, oven, microwave, all educational certificates, fridge, dressing table, inverter, gas geyser, AC, Fan, lights, sandals, everything from head to toe*

has been stolen". The belongings such as bed, almirah, washing machine, oven, microwave, fridge, dressing table, inverter, gas geyser, AC, fan, lights etc. are general household articles for use of all the members of the family, and certainly, in respect of the said articles, the complainant could not have claimed that she alone was in possession. Pertinently, section 378 IPC is not concerned with the aspect of ownership of the movable property. It is only concerned with the possession of the movable property with the person against whose consent the same is, with dishonest intention, taken away. Thus, the submission of Mr. Kundu that the petitioner even took away the passport and other educational certificates/ documents of the complainant- which shows the dishonest intention of the petitioner, is of no avail. Merely because the said documents may have belonged to the complainant, it does not follow that they were in the exclusive possession of the complainant, to the exclusion of the petitioner. In her complaint, the complainant stated "*he has theft, robbed everything, broken my room lock*". However, it is not disclosed as to which were the articles which were kept in the locked room by the complainant. Even the room claimed to have been locked by the complainant has not been particularised.

19. The submission of Mr. Kundu that the petitioner has not joined the investigation is, in my view, not of much significance, considering the fact that the petitioner has premised the present petition on the facts taken note of herein above which transpired prior to the alleged theft, and the manner and circumstances in which the movables were removed by the petitioner from the aforesaid property.

20. I draw support for my view from the decisions relied upon by the

petitioner. In *Neelam* (supra), this court was dealing with a similar situation. The couple could not pull on together. In that case, the complaint had been made by the husband who was a constable in Delhi Police alleging the commission of theft by the petitioner/ wife. The allegation made by the husband in his complaint was that while he was away, his wife – the petitioner, came to his rented house and removed his belongings in a tempo. These articles included those given by the complainant's parents to the petitioner-wife at the time of the marriage, including suits and jewellery. On the same day, the petitioner's wife also lodged a DD entry with the police that she was mal-treated by the complainant. She also informed about the articles that were given by her parents to the complainant in the marriage. She informed that she was going to her parents house of her free will. While quashing the FIR and the proceedings arising therefrom, this court observed in para 4 of this decision as follows:

“(4) The essential ingredient of the offence, therefore, is the removal of a movable article from somebody's possession and that removal must be in pursuance of a dishonest intention. In the present case, admittedly, the petitioner No. 1 and her husband complainant even on the date of incident were residing together in house No. 257, Dakha, Kingsway Camp as husband and wife and all the household goods belonging to either of the spouses were in their joint possession. Obviously, from the different reports made by petitioner No. 1 to the police her intention was that while proceeding to her parental house she would carry everything belonging to her along with her and in doing so if she has removed anything from her own house and from her own possession it cannot be said that the removal was from somebody else's possession much less that it was done with any dishonest intention. Considering the background in which she had to leave her husband's house it can never be said that she removed the goods with any dishonest intention. On the

other hand, it can safely be said that she removed her goods with a view to protect her interest and not to remain at the mercy of the complainant, her husband, who was mal-treating her beyond limits. It is nowhere stated that any other petitioner had entered the house and removed the goods. As a matter of fact, all that the A S.I. had said is that he went to the spot and found the goods being loaded in a tempo by the petitioner No. 1, her father and some relations. It is a common knowledge that goods belonging to the husband and wife are very often stored together. In removing her own goods, it appears, she had removed some belongings of the complainant as well. It is apparent that soon after the removal of these goods she made a report to the police station about it and also told them that she intended to reside with her parents. Thereafter, when it was found on checking of the goods that some belongings of the complainant had also been taken by mistake the police was immediately informed about it but the complainant refused to collect his belongings. Had there been any dishonest intention or means read there was no question of the petitioner No. 1 or her father faithfully tendering this information to the police station on all important points of time. This goes to show that at no stage there was any dishonest intention on the part of the petitioner No. 1 or others which is an essential ingredient of an offence under section 380 Indian Penal Code . I, therefore, find sufficient justification in the grievance of the petitioner. The petition is, as such, allowed and F.I.R.No. 317/84 forming the basis for the prosecution of the petitioners in the court of the Metropolitan Magistrate is quashed. The case against the petitioners is dismissed and the petitioners are discharged”.

21. The aforesaid decision clearly applies in the facts of this case. In fact, the facts are paramateria. The petitioner beforehand informed the local police that the complainant had left the matrimonial home. Like in *Neelam* (supra), in the present case, he stated that the complainant had already taken away all her belongings, including her bed, furniture, clothes, etc. without

any intimation to him. He had also informed that he has to relocate to another city for work and that he shall be taking all his belongings by Movers and Packers. Like in **Neelam** (supra), in the present case also, the petitioner has returned a large number of articles to the complainant. The list of the said articles has been placed on record.

22. The next decision relied upon by the petitioner is **Harmanpreet Singh Ahluwalia** (supra). The Supreme Court in this case was also dealing with a criminal proceeding arising out of a matrimonial dispute. In that context, the Supreme Court, inter alia, observed in para 14 “*But when they are in joint possession, even no offence of theft would also be made out*”.

23. In **Neeru Sharma** (supra), this court again considered the essential ingredient of the offence of theft, namely, of the complainant being in exclusive possession, as opposed to joint possession of the movable property enjoyed by a married couple. The court observed in para 8 as follows:

“8. If the matter is examined from another angle then also ingredients of offence of theft are not disclosed. For constituting the offence of theft, essential ingredient is removal of a movable article from somebody’s possession and that removal must be in pursuance of dishonest intention. At the time of alleged incident of theft, husband and wife were living together. All the articles, including jewelry, were lying in the Almirah which was in their joint possession. Thus, it was for their common use and enjoyment. It is not the case that wife had taken any jewelry after breaking open the Almirah. Thus, even if jewelry and cash had been taken by the wife, same being in joint possession of the spouses, the offence of theft is not made out”.

24. For all the aforesaid reasons, I am of the view that the impugned FIR and the proceedings arising therefrom cannot be sustained and the offence of

theft is clearly not made out on a reading of the FIR and on consideration of the undisputed facts and circumstances. It cannot be lost sight that the petitioner and respondent No.2 are at loggerheads, and respondent No.2 has also initiated divorce proceedings against the petitioner. Viewed in that context, it also appears that the FIR in question is malicious. Accordingly, the writ petition is allowed and the impugned FIR 1250/2015 registered at PS Bindapur under Section 380 IPC against the petitioner, and the proceedings arising therefrom, are quashed.

VIPIN SANGHI, J

FEBRUARY 15, 2017

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