

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

CRIMINAL WRIT PETITION NO. 377 OF 2019

Sou.Manjusha w/o. Sanjay Bhandari,
Age : 46 years, Occ : Agri. & Household,
R/o. Arihant Colony, Kothi Road,
Tq. & Dist. Ahmednagar.

PETITIONER

VERSUS

- 1] The State of Maharashtra
Through Police Inspector
Kotwali Police Station,
Ahmednagar.
- 2] Gopichand s/o. Kisandas Talreja
Age : 72 years, Occ : Business,
R/o. Agarkar Mala, Shivneri Marg,
Station Road, Ahmednagar,
Tq. & Dist.Ahmednagar

.. RESPONDENTS

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Mr. Avishkar S.Shelke. Advocate for the petitioner
Mr. B.V.Virdhe,APP for respondent State.
Mr.N.C.Garud,Advocate for respondent no.2.

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CRIMINAL WRIT PETITION NO. 380 OF 2019

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R/o. Arihant Colony, Kothi Road,
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Mr.N.C.Garud,Advocate for respondent no.2.

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CORAM : MANGESH S. PATIL, J.
DATE : 16.10.2019

ORAL JUDGMENT :-

Heard both the sides. Rule. Rule is made returnable forthwith. The learned APP waives service for the respondent No.1 in both Petitions whereas the learned Advocate Mr.Garud waives service for respondent no.2. With the consent of both the sides, the matters are heard finally at the stage of admission and are being disposed of by this common judgment.

2] The petitioner is the original complainant who filed F.I.R.No.I-185/2016 on 29/5/2016 alleging that she had purchased a piece of land from Survey No.71-F of Ahmednagar. After it was purchased she erected a tin shed and poly house on it. She also carried out some construction of shops therein.

However, in the evening of 29/5/2016, the accused persons including respondent no.2 herein, son of the respondent no.2 and few others having stolen and removed the tin sheds, angles and sheets, the offence was registered under Section 379 read with Section 34 of the I.P.C. The investigation was carried out. It is alleged that the accused persons had removed those articles in a tempo and another vehicle. It is alleged that the son of the respondent no.2 who was the accused no.1 discovered these articles pursuant to the provision of Section 27 of the Indian Evidence Act. Those were seized and in due course of time the charge sheet was filed.

3] The petitioner filed Criminal Miscellaneous Application No.596/2016 under Section 457 of the Cr.P.C. and claimed interim custody of those articles i.e. tin sheets, iron angles and 5 shutters. Simultaneously even respondent no.2 filed Criminal Miscellaneous Application 598/2016 under Section 457 of the Cr.P.C. The learned Magistrate Simultaneously heard both these applications and by order dated 30/6/2016 rejected both the applications.

4] The petitioner as well as respondent no.2 challenged the order passed by the Magistrate by preferring separate Revisions under Section 379 of the Cr.P.C. before the Sessions Court. By the impugned judgments, the learned Additional Sessions Judge dismissed the revision preferred by the petitioner but allowed the Revision of the respondent no.2. Hence these separate Writ Petitions.

5] The learned advocate for the petitioner submits that it was she who had set the criminal law in motion by filing the F.I.R. She had specifically alleged about having erected the shed and poly house and the articles having been

stolen by the son of the respondent no.2. One Pravin Himmatlal Kataria was the original owner and she had purchased that property from him by registered sale deed dated 30/12/2014 and had entered into its possession. As against this, the respondent no.2 was merely claiming to have agreed to purchase that property from Mr.Kataria. It was the unregistered agreement of sale on a Stamp Paper of Rs.100/-. It is in view of such peculiar state of affairs, the petitioner was the rightful claimant to have interim custody of the material seized during the investigation.

6] The learned advocate would further point out that the respondent no.2 has also filed a Suit for specific performance of the alleged agreement of sale but was unable to procure any interim relief as regards possession. Since that order rejecting his application for temporary injunction based on his application (Exh.5) in Special Civil Suit No.96/2016 had become final, there was no question even to *prima facie* hold that the shed was erected by the respondent no.2 and the material was belonging to him. The petitioner had produced all the receipts and cash memos under which she had purchased the material for erecting the shed. Since even the prosecution has been launched based on her allegation, she alone was entitled to receive the property seized during the investigation.

7] The learned advocate would then submit that the learned Additional Sessions Judge has overlooked all the aforementioned aspects and has simply by assigning a reason in one sentence has held respondent no.2 to be entitled to receive the articles by observing that those have been seized from the possession of the son of the respondent no.2. The observations and the conclusions drawn by the learned Additional Sessions Judge are clearly

perverse, arbitrary and capricious and may be quashed, set aside and reversed.

8] The learned advocate for the respondent no.2 supports the impugned orders and submits that no fault can be found in the discretion exercised by the learned Additional Sessions Judge when the Magistrate had refused to exercise it judiciously. Even according to the prosecution, the articles were seized in the alleged discovery made by the son of the respondent no.2. He had also produced receipts *prima facie* showing that he had purchased those articles and therefore, there is no illegality or perversity in the impugned order.

9] The learned advocate for the respondent no.2 also submits that in fact he had agreed to purchase that property from the original owner Kataria under an agreement dated 27/12/2012. It was specifically recited in that agreement that even possession was being delivered to him. It is thereafter that the petitioner has purchased that property from Kataria on 30/12/2014. Therefore, when the Suit filed by the respondent no.2 for specific performance is pending before the Civil Court, *prima facie* he may not be held to be in possession of the property and the rightful claimant for the articles seized.

10] True it is that there is an agreement of sale purportedly executed in favour of the respondent no.2 by original owner Kataria which was first in point of time and it is thereafter that Kataria seems to have sold the property to the petitioner after couple of years. Obviously the rival claims to the property would be decided by the Civil Court in a proceeding filed by respondent no.2. However, the fact remains that admittedly the application of

the respondent no.2 for temporary injunction for protecting his possession has been rejected and the order has reached finality. If that be so, at this stage, it is an important piece of material to *prima facie* hold that the petitioner was in possession of the property where shed was erected and which according to her was dismantled and the articles were stolen.

11] If such is the state of affairs, the learned Additional Sessions Judge ought to have considered all these aspects which he has clearly overlooked and has perfunctorily refused to enter into any inquiry by observing that since the articles were seized from the possession of the son of the respondent no.2, he was entitled to receive it. One cannot comprehend as to how, when the articles have been seized pursuant to an investigation on an F.I.R. lodged by the petitioner which has culminated in filing of the charge sheet could have been ignored so lightly by learned Additional Sessions Judge. It is the prosecution version that it is pursuant to the statement made by son of the respondent no.2, that these articles were discovered and seized. It would be highly objectionable to release such articles in favour of the respondent no.2 who happens to be the father of the prime accused. Simultaneously it would also be miscarriage of justice if in spite of registration of the crime which has been found to have substance and the charge sheet has been filed for the offence of theft of these articles, if the articles are not returned to the petitioner. The learned Additional Sessions Judge has lost sight of the aforementioned aspects. He has conveniently ignored them and in a slipshod manner in one sentence held the respondent no.2 to be entitled to receive the articles. The impugned orders are grossly perverse, arbitrary and erroneous and fit to be quashed, set aside and reversed.

12] Both the Writ Petition are allowed. The impugned orders are quashed and set aside. The applications filed by the petitioner stands allowed. The property shall be returned to her subject to following conditions :

[i] She shall execute a personal recognizance for an amount of Rs.2,00,000/-(Rs.Two Lakhs) before the Magistrate and furnishes a surety in the like amount.

[ii] She shall return the property as and when directed by the Court.

13] The Application filed by the respondent no.2 stands rejected. The Rule is made absolute.

[MANGESH S. PATIL, J.]

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