

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**REVISION APPLICATION NO. 500 OF 2015**

Mrs. Kamal Janardan Karande  
Residing at Om High Court CHSL  
B/2, Room No. 1, Chikuwadi,  
Shimpoli Village,  
Borivali, Mumbai – 92.

...Applicant

Vs.

1. The State of Maharashtra  
(at the instance of Dindoshi  
Police Station)
2. Dilip Purshottam Patel  
Residing at G/1, Janardan Smriti  
Bldg., Siddhivinayak Lane,  
Bhayander, District Thane
3. Jagdish Babu Salian  
Residing at D/604, Gokulvihar,  
Thakur Complex, Kandivali (E)  
Mumbai
4. Yogesh Shantilal Vyas  
Residing at 13/B1 Madhulkar terrace,  
Kastur Park, Shimpoli, Borivali (W)  
Mumbai
5. Nimesh Mohanlal Bhavsar  
Residing at A/703, Om Sai Smriti  
LM Road, Kandarpada,  
Dahisar (W)  
Mumbai

...Respondents

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Mr. Amit A. Gharte - Advocate for the Applicant

Mr. Ganesh Bhujbal - Advocate for the Respondent No. 2

Mr. Sahil Choudhari a/w Ms. Ruchi Pawar i/by Ms. Mallika A. Ingale –  
Advocate for Respondent No. 5

Mr. H. J. Dedhia – APP for the Respondent-State

Mr. Janardan Karande – Husband of the Applicant present

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CORAM : S. M. MODAK, J.

DATE : 23<sup>rd</sup> JANUARY 2024

**JUDGMENT :-**

1. Heard learned Advocate Shri Amit Gharte for the Applicant-first informant, learned Advocate Shri Bhujbal for Respondent No. 2 and learned Advocate Shri Sahil Choudhari for Respondent No. 5 and learned APP. The husband of the Applicant is also present.

2. As directed on the last date on 15/01/2024, this revision was heard irrespective of the fact that all Respondents were not served. It was heard at the stage of the admission finally. It is for the reason, the Applicant has not served all of them except Respondent Nos. 2 and 5. Though Applicant made attempts to serve other Respondents, finally service was not effective.

3. The Court of the Additional Chief Metropolitan Magistrate, Borivali as per judgment dated 16/07/2010 at page no. 24 has acquitted four accused person for the offence punishable under Sections 451, 380, 427 read with 34 of the Indian Penal Code. The incident of house breaking and theft took place in respect of room no.31 situated in Jyotirling Co-operative Housing Society, Navasha Compound, Borivali, Mumbai. There were two versions about possession of this room. According to the first informant/Applicant Mrs. Kamal Karande and her husband, prior to its demolition the room in question was in their possession whereas the accused persons pleaded before the trial court that possession was never with them whereas they were in possession.

Prosecution case.

4. The Applicant and her husband went to Pune on 12/8/2004 and when they returned they realized that not only their articles lying in the room were stolen but the entire room was demolished. On inquiry, it was revealed that the builders have demolished the room. On this background, the Applicant-Kamal lodged the written complaint on 15/08/2004 with Dindoshi Police Station. With all sort of persuasion,

the offence was registered on 24/09/2004 for the offences under Sections 448, 380, 427 read with Section 34 of Indian Penal Code against four accused persons. All the accused were charge-sheeted. During trial, the prosecution in all examined four witnesses. They are as follows :-

Prosecution witnesses

|          |                        |                                                                                                                                                              |
|----------|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| PW No. 1 | Kamal Janardan Karande | First informant                                                                                                                                              |
| PW No. 2 | Janardan Karande       | Husband of first informant                                                                                                                                   |
| PW No. 3 | Arun Waljhade          | Police Inspector/<br>Investigating Officer who recorded the F.I.R., carried out spot panchnama and recorded the memorandum statement of accused Dilip Patel. |
| PW No. 4 | Subhash Sawant         | Police Inspector, Subsequent Investigating Officer who made correspondence with the Society wherein room in question was located.                            |

5. The Court of Additional Chief Metropolitan Magistrate, Borivali acquitted the Respondents vide judgment dated 16/7/2010 (page no. 70) mainly for following reasons:-

Reasons for acquittal

- i) The prosecution could not prove the first informant's

possession over the room.

- ii) There are lacunae in the memorandum statement given by the accused-Dilip Patel under Section 27 of the Indian Evidence Act.
- iii) So to say description of the place from where the stolen articles were recovered is not clear and signature of the accused is also not taken.

**6.** Being the victim, the first informant preferred an appeal before the Court of the Additional Sessions Judge, Greater Mumbai. It was dismissed on 13/10/2014. The Applicant contends that there was no re-appreciation of the evidence and the Appellate Court has not assessed the evidence independently which he was bound to do being last fact finding court. That is why, she has filed present revision application.

#### Scope of revision against concurrent findings

**7.** It is settled law that in revision there is hardly any scope for the re-appreciation of the evidence. The phrase '*appreciation of evidence*' is not defined anywhere. It is a process of coming to particular conclusion. Its plain meaning is :--

- a. to consider the weightage to be given to particular piece of evidence,

- b. to draw inferences on the basis of proved facts and
- c. then to come to particular conclusion.

In a revisional jurisdiction, the **revisional Court is not supposed to undertake the exercise :--**

- a. whether particular fact is proved,
- b. whether the testimony is reliable or not,
- c. whether one piece of evidence corroborates to another piece of evidence.

**But what exercise which can be undertaken is :--**

- a. before concluding that fact is proved whether the provisions of the Evidence Act are followed or not,
- b. whether the inferences drawn on the basis of proved facts were drawn on the basis of principles laid down in the law or not,
- c. whether inadmissible evidence is accepted or
- d. whether admissible evidence is ignored and then conclusion is drawn.

There can be revision application filed by the State/first informant or can be filed by the accused. When it is filed against judgment of acquittal against concurrent findings, there is almost no scope for interference as the presumption of innocence is reinforced not only by the trial court but by the Appellate Court also. With this view in mind, I have heard both the sides.

### Submissions for Complainant

**8.** Learned Advocate Shri Gharte vehemently submitted that there is lapse on the part of the both Courts below to deal with the evidence.

He focused mainly on the following points:-

- a) The trial Court's approach was not correct. So to say, in a theft and housebreaking offence, title over the room is not relevant, but who is in possession is predominant. He invited my attention to the observations in para no. 8 of the judgment wherein the trial Court has dealt with the documents tendered during the evidence of the PW Nos. 1 and 4. The approach of the trial court was as if he was deciding a title suit.
- b) Signature of the accused to memorandum statement is not required. Whereas the trial Court observed to the contrary in para no. 15. To buttress his submission, he relied upon the following judgment:-  
*i) Dr. Sunil Clifford Daniel Vs. State of Punjab*<sup>1</sup>
- c) According to him, the trial Court and the Appellate Court failed to draw an inference about culpability against accused Dilip Patel on the basis of his memorandum statement.
- d) According to him, the presumption under Section 114 of the Evidence Act will be applicable. To buttress his submission, he relied upon the following judgments:-

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<sup>1</sup> 2012 AIR SCW 5180

- i) Mansingh Dhondiram Sakpal Vs. State of Maharashtra<sup>2</sup>
- ii) Imran Khan @ Banti Noorkha Pathan Vs. State of Maharashtra<sup>3</sup>
- iii) Shivappa and Others Vs. The State of Mysore<sup>4</sup>

### Prosecution Evidence

**9.** He invited my attention to the contents of the memorandum statement on page no. 119. It was recorded on 29/09/2004 given by the accused Dilip Patel. Whereas on page no. 120, the description of the place where he has kept the stolen articles is given and description of the articles is mentioned on page no. 121. He also tried to explain the delay in lodging the F.I.R.. Written complaint was lodged immediately on 15/08/2004, whereas Police were late in registering an offence. Even though there is a prayer for convicting the Respondents, he submitted that the matter may be remanded for fresh consideration. He was fully aware of the limitations on revisionary powers.

### Submission for accused

**10.** Both learned Advocates for the respective Respondents have opposed the revision. According to them, the prosecution could not

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2 2017 (3) Mah. Law Journal (Cri.) 90

3 2019 (3) Mah. Law Journal (Cri.) 157

4 1971 Cri. L.J. 260

prove the possession of the first informant. They have invited my attention to the following facts:-

- a) The conduct of the first informant in disowning particular portion from the F.I.R. In the F.I.R., she has stated that she has handed over the key to the builders seven to eight months back and the builder was using that room. It was marked portion, at page no. 97. It mentions on 15/08/2004, the first informant was not in possession of the room.
- b) The correspondence made by the investigating officer PW No. 4 with the first informant, Society and the reply given by the Society (Exh. P--32 to P--39) and it is reflected in para no. 12 of the judgment.
- c) Society vide letter dated 19/10/2004 (P—31) has informed that the Non agriculture Order obtained by the first informant-Mrs. Kamal was cancelled by the Deputy Collector, Andheri on 30/09/1991 and the room was in possession of the Society and in fact Satyanarayan Pooja was also performed on 16/5/1991.
- d) As the room was in possession of the Society and the articles found with the Accused Dilip Patel cannot be said to be recovery

of stolen articles as contemplated under Section 27 of the Indian Evidence Act.

Findings of Trial Court.

**11.** On the basis of the above submissions, I have perused the findings given by the Courts below. It is true that in para no. 8, the Trial Magistrate has considered various documents tendered in the evidence. The trial Court has also recorded that except the ration card all other documents are either not there or they do not prove the case of the possession. The ration card is issued on 20/03/2001. Whereas the offence of theft is disclosed on 15/08/2004. Trial court observed:--

*“ the aforesaid evidence does not show that on 15/8/2004, the room in question was in possession and occupation of Kamal Karande. As per the deposition of P.W. 1 Kamal Karande and P.W. 4 Subhash Sawant even the electric connection could not be procured in the said room and the telephone connection was not operating since November, 2001”.*

**12.** Furthermore, the trial Court in para no. 10 has also recorded the answers given by PW No. 1 in cross-examination. It is true that she has

answered that the F.I.R. was not read over by the Police. At the same time, it is also true that on 15/08/2004, she has filed a written complaint and she has referred about the same in her evidence. It is on internal page no. 5 and page no. 46 of the first compilation. I have also perused that complaint.

**13.** According to learned Advocate for the Respondents in that complaint she has only prayed for allotment of flat and grievance of the theft is not made. Whereas according to learned Advocate for the Applicant in the first page itself she has made complaint about demolishing the room without her permission. But one can very well say that trial Magistrate has not referred about that complaint in the judgment neither the Appellate Court. Now the issue is whether it can be ground for remanding the case to the trial Court on account of non consideration of particular evidence available.

Findings given by the Appellate Court.

**14.** There is also a grievance raised on behalf of the Applicant about the approach of the Appellate Court. Contention is the Appellate Court has not taken pains in re-appreciating the evidence. If the Appellate Court finds that the view taken by the trial court is correct,

one cannot always say that it is wrong. The Appellate Court is not bound to agree with the aggrieved party, unless and until it appeals to the conscious of the Appellate Court. The grievance raised now cannot be entertained. The Appellate court observed :-

*“Room about which informant makes accusations was admittedly used for society office. She says that the keys were handed over to developer. It is not known whether it was her room or that it was a office in which she had kept her articles” (para no. 5).*

Appellate Court further observed :--

*“ in any event, taking best case, the case appears to be of civil nature. Informant has to move to civil court for establishing her rights in respect of permanent alternative accommodation for her.*

Even Appellate Court taken note as :--

*“I am told that she did file the suit for alternative accommodation in lieu of her alleged structure but unfortunately unsuccessful. The Civil Court has dismissed the suit as she was unable to prove that she had a structure*

*and was entitled to a flat in lieu thereof in redevelopment scheme. I am told that there is appeal filed and it is pending. Remedy to informant would be in said appeal”.*

### Findings

**15.** I do not find any reason to disagree with these findings. They are arrived after proper appreciation of evidence. The Appellate Court is not expected to consider what is orally submitted ‘*about outcome of the civil suit*’ (para no.5). In fact the Appellate Court is bound to consider what is there in the evidence. But even otherwise these observations are not challenged as factually incorrect. Atleast, it is not submitted during oral arguments on behalf of the Applicant.

**16.** It is also true that in case of theft and house trespass, the title is not important but what is important is possession. We have got ration card produced by the first informant on page no. 67 of the first compilation. Whereas there is a letter sent by the Society to the Police informing that in the year 1991, Satyanarayan pooja was performed and first informant and her husband sat for the Pooja. No doubt any representative from the Society was not examined. However that letter was tendered in the evidence through PW No. 4.

**17.** On this background, this Court has to determine whether the facts of the possession and the evidence have been properly appreciated by the trial Court and this exercise can only be done with limited scope. When this exercise is done, what I find is that there were two versions before the trial Magistrate about the possession over that room.

**18.** No doubt the first informant may be in possession of that room earlier but ultimately the Court has to see whether she was in possession when she came to know about theft on 15/08/2004. Ration card is of the year 2011. Except the first informant and her husband, no witnesses were examined to show that she was in possession on 15/08/2004. Except ration card, there are no other documents to prove the possession. Though few of the documents are tendered in the evidence, the trial Court has not considered them for the reason that they were not original. It finds place in para no. 8.

**19.** It is very well true that scope of the inquiry about possession before Criminal Court is not as contemplated in trial of the suit. It is also true that the possession may not be lawful also but there has to be a possession. Possession has to be proved independently by showing

the documents either of the Government or private documents wherein it is mentioned that the first informant resides on that address. It may be proved by examining the person who knows that the room is occupied by the first informant. Unfortunately, except these two witnesses and the ration card, there are no other documents. So even though the trial Court has not considered the complaint dated 15/08/2004, I am unable to accept the contention of the Applicant's counsel that the evidence has not been properly appreciated. Because mere reference in that complaint about possessing the room is not sufficient. What is important is to adduce evidence and this is more true when the society contend that the possession was with them. I agree with the findings given by both Courts below that possession of the Applicant as on 15/08/2004 was not proved. For the reasons stated above, these findings cannot be varied in exercise of revisional jurisdiction.

#### Recovery of stolen articles

**20.** It is true that as per Section 114 of the Evidence Act, if the person is found in possession immediately then he is bound to give an explanation. In all these judgments relied upon by the Applicant, the

Court has emphasized on the fact that the possession must be immediate. In this case the incident was unearthed on 15/08/2004, whereas articles were found on 24/09/2004. There was gap. Furthermore, possession contemplated under Section 114 is immediate possession and not the subsequent recovery as contemplated under Section 27 of the Indian Evidence Act. So the observations in the judgments will not be useful to the Applicant. Even if we believe that signature on memorandum statement is not required, still this recovery of articles could have been considered as a circumstance against accused Dilip, only when prosecution could have succeeded in proving possession of the first informant and not otherwise.

### Conclusion

**21.** For the above reasons, I do not think that both the Courts below have wrongly appreciated the evidence. So revisional jurisdiction cannot be exercised. So I dismiss the revision.

**[S. M. MODAK, J.]**