

Kishore Jain Vs. the State

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Court : Delhi

Decided On : Oct-09-2001

Reported in : 2002CriLJ1154; 94(2001)DLT558; 2002(61)DRJ164

Judge : S.K. Agarwal, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 448; Delhi Municipal Corporation Act - Sections 343, 344, 345(1) and (2), 345-A, 345-A(1), (2) and (3), 465 and 491

Appeal No. : Crl. M.(M) No. 1757/94

Appellant : Kishore Jain

Respondent : The State

Advocate for Def. : O.P. Saxena, Adv.

Advocate for Pet/Ap. : G.K. Srivastava, Adv

Disposition : Petition dismissed

Judgement :

S.K. Agarwal, J.

1. This petition u/s. 482 of Code of Criminal Procedure 1973 (for short 'Cr.P.C.') is directed against the order dated 26th November, 1993 passed by the court of

Metropolitan Magistrate, framing charge against the petitioner under Section 448 IPC, in the case FIR No. 13/91 P.S. Anand Parbat, Delhi. The question which arises for consideration is : whether the corporation was or not in possession of the premises, after the same were duly sealed under Section 345-A of Delhi Municipal Corporation Act (here-in-after DMC Act), for unauthorised construction?

2. The facts in brief are : On 11th December, 1990 the Deputy Commissioner, Municipal Corporation of Delhi, after considering reports regarding unauthorised construction, at premises NO. 25/8-A , Gali No.7, Anand Parbat, Karol Bagh, Delhi (hereinafter referred to as 'the premises'), in exercise of the powers vested in him u/Ss. 345A-A and 491 of DMC Act, and the Rules made there under, directed the Zonal Engineer to forthwith seal the premises where the said unauthorised construction/erection or work was being carried out. It was further ordered that the said premises shall remain sealed with the seal of MCD and shall remain in the personal custody of the Zonal Engineer and that no person shall remove the seal except under the orders of the authorities provided by sub-section (3) of Section 345-A of the Act. In pursuance of this order, Zonal Engineer-Building, Karol Bagh sealed the entire building at ten different points, on 7th December, 1990 SHO, P.S. Anand Parbat was informed about the same, and specimen seal affixed at the said premises Along with, copy of the sealing order was also sent to him. He was requested to keep a strict watch over the seals so that the same are not disturbed or removed. On 7th January, 1991 Junior Engineer (Building) during inspection of the area found that seals of the above said premises were broken without any order and that the owner/builder had started further unauthorised construction. Consequently on 8th January, 1991, the Zonal Engineer (Building), lodged a report with the SHO. FIR for criminal trespass was registered. After completion of investigation challan was filed and cognizance was taken. Learned trial court by the impugned order found that prima facie case of criminal trespass was made out against the petitioner and charge under section 448 IPC was framed against him. The same is under challenge. I have heard learned counsel for the petitioner and learned APP for the State and have been taken through the record.

3. Learned counsel for the petitioner argued that the offence of criminal trespass as defined in Section 441 IPC, can only be committed against a person who is in

actual physical possession of the premises; it pre-supposes, positive and de-facto possession of the complainant. In this case the possession of the premises remained with the petitioner, being owner of the premises and merely because the premises were sealed by the Corporation u/S. 345-A of the DMC Act, for some alleged unauthorised construction, it cannot be said that petitioner was dispossessed. therefore, framing the charge of criminal trespass is liable to be quashed. Reliance was placed on the decisions: (1) Janggu @ Shobhit and Others v. State of M.P. 2000 (1) Crimes 7; (2) Golak Baliarsingh v. Purna Chandra Baliarsingh and Ors. 1977 Cri.L.J. 77 ; (3) G. Gurdial Singh & Ors. Vs . Abhey Dass ; (4) Basanta Kumar Gon Vs . The State : AIR1956 Cal118 ; (5) Lalchand Pitumal v. Emperor AIR 1993 Sind 396; (6) Bismillah & Ors. v. Emperor 1929 Cr.L.745.

4. There cannot be any dispute about the proposition of law that offence of criminal trespass pre-supposes, positive or de-facto possession of the complainant and in the absence of the same prosecution cannot succeed. The possession referred to in Section 441 must be actual possession of some person other than the alleged trespasser and the question of title is not relevant in these proceedings. However, here the question is: whether the complainant was in possession of the premises after the same was sealed under Section 345-A of DMC Act?

5. The term 'possession', may have different meaning in different contexts. It has not been possible to work out any precise definition of 'possession', which can be uniformly applicable to all situations in the context of all statutes. In this regard, it would be useful to refer to the observations made by the Supreme Court in Superintendent & Remembrancer of Legal Affairs Vs . Anil Kumar Bhunja and others : 1979 CriLJ1390 . It was held:

'13. Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the contexts of all statutes. Dias & Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edition, 1966)

caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention, It involves power of control and intent to control. (See Dias and Hughes, *ibid*).

14. According to Pollock & Wright 'when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of thing.

15. While recognising that ;possession; is not a purely legal concept but also as matter of fact; Salmond (12th Edition, pages 52) describes 'possession, in fact', as a relationship between a person and a thing. According to the learned author the test for determining 'whether a person is in possession of anything is whether he is in general control of it.' (emphasis supplied)))

6. Thus, for determining as to who was in possession of the premises, the test to be applied is as to who was in power or who could assume, exercise or resume manual control of it at pleasure, excluding entry of the other. In order to determine the same at this stage, it would be useful to refer to Section 345-A of DMC Act, which empowers the Commissioner to seal unauthorised construction etc. It reads:-

'345A. Power to seal unauthorised constructions

(1) It shall be lawful for the Commissioner, at any time, before or after making an order of demolition under Section 343 or of the stoppage of the erection of any building or execution of any work under Section 343 or under Section 344, to make an order directing the sealing of such erection or work of the premises in which such erection or work is being carried on or has been completed in the manner prescribed by rules, for the purpose of carrying out the provisions of this act, or for preventing any dispute as to the nature and extent of such erection or work.

(2) Where any erection or work or any premises in which any erection of work is being carried on, has or have been sealed, the commissioner may, for the purpose of demolishing such erection or work in accordance with the provisions of this Act, order such seal to be removed.

(3) No person shall remove such seal except-

(a) under an order made by the Commissioner under sub-section (2); or

(b) under an order of an Appellate Tribunal or the Administrator, made in an appeal under this Act.'

7. To recapitulate the facts in this case, Deputy Commissioner of Corporation, feeling satisfied that the unauthorised construction /erection of the building was in progress, in exercise of his powers under Section 345(1) of the Act ordered Zonal Engineer, to seal the premises. It was ordered that no person shall remove the seal except under the orders made by the Commissioner under sub-section(2) or under an order of the Appellate Tribunal or the Administrator made in an appeal provided under the Act. In pursuance of this order, the entire building was sealed at ten different points. SHO, PS. Karol Bagh was informed with the request to keep watch over the seals. It appears that the petitioner did not approach any authority, under DMC Act, for orders, for removal of seals. On 8th January, 1991 J.E. of the area found the seals broken and unauthorised construction in progress on said premises. Thereafter matter was reported to the police and above noted case for criminal trespass was registered. During investigation, petitioner was found to be responsible for breaking open the seals and starting unauthorised construction over the premises.

8. In the above factual situation, after the premises were sealed, the petitioner or any body-else on his behalf, was excluded from having access to the premises by operation of sub-sections (1) and (3) of Section 345-A of the DMC Act. Thus, the de-facto control and dominion over the premises was transferred to the Deputy Commissioner, DMC or the compliant. The petitioner may be the owner but he ceased to be in possession of the premises. The act of sealing the premises involved the power to control and intent to control. The moment the premises were

sealed by the officers of DMC, in exercise of their lawful duty, they assumed possession and actual control of the premises. Sub-section 3 of the Section 345-A of DMC Act clearly provided that no person is entitled to remove seals except by an order of the Commissioner or by the Appellate Tribunal or by the Administrator. Admittedly, no such order was passed by any of these authorities, That being so, the offence of criminal trespass as defined under Section 441 punishable under Section 448 is made out. Ratio of the judgments relied upon by the learned counsel for the petitioner, are not applicable to the facts of this case.

9. Learned counsel for the petitioner next argued that DMC Act is a complete Code in itself and for the offences defined under the Act, punishment is provided in the 12th Schedule. The offences for which no punishment is provided in the schedule are punishable under Section 465 of the Act which provides penalty for the remaining offences. It provides: if any person fails to comply with any notice, order of requisition issued under any provision thereof or otherwise contravenes any of the provisions of the DMC act, shall be punishable with fine of Rs.100/- and in case of a continuing failure or contravention with additional fine which may be extended up to Rs.20/- every day. On the strength of this section, learned counsel for the petitioner argued that assuming the allegations to be true, petitioner would be liable to suffer prosecution and punishment under this Section and not for the offence of criminal prosecution. I am unable to agree. The breaking the 'seals' of the building sealed under DMC Act, is not defined as the offence under the Act, so the question of providing punishment or penalty, either in the Schedule or under Section 465 does not arise. This contention has also no force and is rejected.

10. For the forgoing reasons, I find no merit in the petition and the same is dismissed.

11. The order dated 12th July, 1994 staying the proceedings before the trial court and all subsequent orders thereto, are vacated. Trial court is directed to expedite the trial. Any observations made in this order shall not affect the case of the petitioner on merits.