

Prabhat Bhatnagar Vs. State and ors.

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Court : Rajasthan

Decided On : Jul-17-2007

Reported in : 2007CriLJ4349

Judge : R.S. Chauhan, J.

Appellant : Prabhat Bhatnagar

Respondent : State and ors.

Judgement :

ORDER

R.S. Chauhan, J.

1. The complainant-petitioner has challenged the order dated 9-6-1998 passed by the Additional Chief Judicial Magistrate (Sr. Div.) No. 3, Jaipur City, Jaipur whereby the learned Magistrate has dismissed the protest petition filed by the petitioner and has accepted the Final Report filed by the investigating agency.

2. The brief facts of the case are that the petitioner had an ancestral property in the form of a residential house situated at Municipal House No. 4531 and 4532, Sikattar Ji Ka Chowk, Kundigaron Ke Bheron Ji Ka Rasta, Johari Bazar, Jaipur. According to the petitioner, the said house was constructed by his grandfather namely Munshi Kripa Shankar Bhatnagar, in between 1910-1915, Shri Kripa Shankar Bhatnagar died in the year 1937, leaving behind two sons and a daughter

namely Sh. Prakash Narain Bhatnagar, the petitioner's father, Sh. Kailash Narain Bhatnagar, the petitioner's uncle and also Smt. Sushila Devi, the petitioner's aunt. The said house is known in the municipal records as 'Nazim Kripa Shankar Ki Haveli'. The said house was constructed by the petitioner's grandfather with his self-earned money. The petitioner's father lived in the said house till 1990. The petitioner's uncle also resided in the house till the respondent No. 3, Arvind Kumar Sharma, forced him to vacate the house. Due to several disputes between the family members, civil suits were filed against each other. It is further claimed by the petitioner that his father had given a power of attorney in favour of the respondent No. 3 for contesting the civil suits on his behalf. After his father's demise, since the petitioner was posted outside Jaipur, the petitioner along with his mother and sisters appointed the respondent No. 2, Kailash Prasad Sharma as the power of attorney holder but solely for the purpose of contesting the civil suits. It is further alleged that the ground floor as also the first floor of the said house was in possession of the petitioner's mother. However, after the demise of his father, his mother was shifted by the respondent Nos. 2 and 3 into their house somewhere in October-November 1990. The respondent No. 3 happened to be married to the petitioner's sister and thus is the son-in-law of the family. Therefore, the mother shifted with her own daughter, son-in-law and their family members. During her stay with the daughter and the son-in-law, it is alleged, that the respondent Nos. 2 and 3 broke the locks of the house which was with petitioner's mother and took away all the articles lying inside with them i.e. antique arms, gold and silver items, jewellery, furniture etc. The petitioner has also claimed that when he came back to Jaipur on 3-6-1995, he inquired about the house left by his father. However, he was shocked and surprised to learn that not only the house has been sold by the respondent Nos. 2 and 3 to the respondent Nos. 4 and 5, but in its place, a commercial complex has been constructed in the name and style of Emerald Towers. It is the case of the petitioner that the respondent Nos. 2 and 3 in collusion with respondent Nos. 4 and 5 executed a fake sale-deed and sold the property. It is further his case that all this has been made possible by a fake power of attorney. Therefore, the petitioner lodged a report at P.S. Manak Chowk, Jaipur against the respondent Nos. 2 to 5 for offences under Sections 453, 380, 406, 420, 467, 468, 471 and 120B, IPC. On the basis of this report, a formal FIR No.

444/1997, was chalked out for the aforementioned offences. However, after a thorough investigation, the police submitted a negative Final Report before the learned Magistrate. To counter the negative Final Report, the petitioner submitted a protest petition before the concerned Magistrate. However, after hearing the arguments, vide order dated 9-6-1998, the learned Magistrate rejected the protest petition and accepted the negative Final Report. Hence, this petition before this Court.

3. Mr. V.R. Bajwa, the learned Counsel for the petitioner; has vehemently raised number of contentions before this Court; firstly, that the jurisdiction of the learned Magistrate while taking cognizance is a limited one. At the moment of taking cognizance the Magistrate is concerned, with the existence of prima facie case. At this juncture, the learned Magistrate cannot meticulously go into the merits or demerits of the case. However, in the instant case, the learned Magistrate has not only discussed the evidence, but has also given a judicial finding. Thus, he has overstepped his jurisdiction. Secondly, that the learned Magistrate has presumed the power of attorney to be a valid one ostensibly on the ground that the power of attorney bears the signature of the petitioner. The learned Magistrate has drawn the presumption under Section 114 of the Evidence Act. But, such a presumption is rebuttable one. However, the learned Magistrate has deprived the petitioner of his right to rebut such a presumption. After all, such a presumption can be rebutted only during the course of trial and not at the stage of acceptance or rejection of the negative Final Report. Thirdly, when negative Final Report was submitted and protest petition was also pending before the learned Magistrate, the learned Magistrate was required to record the statement of the complainant and his witnesses under Sections 200 and 202 of the Criminal Procedure Code. However, the learned Magistrate has accepted the negative Final Report and rejected the protest petition without following the said procedure mentioned above. Therefore, the learned Magistrate has deprived the petitioner of his right to get his statement recorded. Fourthly, that according to the evidence available on record, the petitioner's mother had taken all her jewellery and other movable items including utensils, gold & silver ornaments, etc. with her when she shifted to the house of respondent Nos. 2 and 3. Upon her demise, the respondent Nos. 2 and 3 were required to return the said movable properties to the petitioner. However,

they have simply failed to do so. Therefore, the ingredients of offence under Section 404, IPC certainly exist. Lastly, the case should be remanded back to the learned Magistrate. In order to support the last contention, the learned Counsel for the petitioner has relied upon the case of Mst. Radha v. State (S.B. Criminal Rev. Pet. No. 231/1994 decided on 7-8-1998) by this Court.

4. On the other hand, Mr. Rinesh Gupta, the learned Counsel for the respondent Nos. 2 and 3 and Mr. B. K. Sharma, the learned Public Prosecutor have supported the impugned order and have contended that the learned Magistrate was within his jurisdiction to shift the evidence and to come to a definite conclusion.

5. Mr. R.S. Mehta, the learned Counsel for the respondent Nos. 4 and 5, has strenuously argued that the respondent Nos. 4 and 5 are bona fide purchasers who have purchased the said house after examining the documents which were submitted before them. According to the respondents, the power of attorney given by the petitioner contains a recital that the respondent Nos. 2 and 3 would have the power to sell the said house. Since the said recital is contained in the power of attorney, the respondent Nos. 4 and 5 were justified in buying the property from the respondent Nos. 2 and 3. Therefore, no offence is made out against them. Moreover, the respondent Nos. 4 and 5 are unconcerned with offence under Section 404, IPC.

6. We have heard the learned Counsels for the parties, and have perused the record which is available before us.

7. It is, indeed, a settled principle of law that at the stage of taking cognizance, the learned Magistrate should consider the existence; of prima facie case against the alleged offender/s. At the initial stage, the learned Magistrate cannot meticulously comb the evidence and he is not empowered to come to any final judicial finding. A perusal of the complaint reveals that according to the petitioner, the power to sell the property was not given to the respondent Nos. 2 and 3. The power was limited only to contesting the civil suits which were pending before the Civil Courts. Moreover, according to the petitioner. his mother shifted into the house of respondent Nos. 2 and 3 and had taken all the movable properties with her which have not been returned to the petitioner despite the demise of his mother. He has

alleged that when the sale-deeds were executed between 7-4-1992 to 21-9-1992, there was collusion between respondent Nos. 2 and 3 on one hand and respondent Nos. 4 and 5 on the other.

8. A bare perusal of the impugned order reveals that the learned Magistrate has presumed under Section 114 of the Evidence Act that since petitioner's signatures exist on the power of attorney, therefore, the said power of attorney is a valid one. However, the learned Magistrate has overlooked the fact that the presumption under Section 114 of the Evidence Act is rebuttable presumption. Therefore, instead of giving the petitioner an opportunity to rebut the presumption, the presumption had been drawn against him. At this juncture, the presumption cannot be conclusive. Hence, the learned Magistrate has exercised a jurisdiction which is not vested in him when he passed the impugned order.

9. Section 404, IPC deals with the 'Dishonest' misappropriation of property possessed by deceased person at the time of death'. Section 404, IPC reads as under:

404. Dishonest misappropriation of property possessed by deceased person at the time of death'.- whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's demise, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's deceased was employed by him as a clerk or servant, the Imprisonment may extend to seven years.

10. The very object of this provision was to protect the property which was in possession of deceased at the time of his death till the person(s) entitled to it step in. According to the learned Magistrate, Devi Singh, one of the witnesses whose statement was recorded by the police, has clearly stated that the petitioner's mother had taken certain movable property with her when she shifted to daughter's house. Hence, the movable property belonging to her was in the house of respondent Nos. 2 and 3 when the petitioner's mother expired. Thus, they were

duty bound upon her death to return the said property to the petitioner. However, according to the petitioner, the said property has not been returned to him so far. Hence, prima facie offence under Section 404, IPC has been made out. Despite the existence of a prima facie case, the learned Magistrate has dismissed the protest petition and has accepted the negative Final Report.

11. As far as the question with regard to the collusion between the respondent Nos. 2 and 3 on one hand and respondent Nos. 4 and 5 on the other, is concerned, the same can be decided only after evidence has been led in full fledged trial. For, criminal conspiracy is not hatched in the open and direct evidence may be unavailable. It can be gathered only after considering the entire evidence.

12. In the result, the impugned order is unsustainable. Therefore, we remand the case back to the learned Addl. Chief Judicial Magistrate (Sr. Div.) No. 3, Jaipur City, Jaipur and direct the learned Magistrate to firstly record the statement of complainant and his witnesses, if any, and to consider the acceptance or rejection of the negative Final Report submitted by the police in the light of statements so recorded. The petitioner is directed to appear before the learned Magistrate on 30-7-2007. In the meanwhile, the Deputy Registrar (Judicial) is directed to send a copy of this order to the concerned Magistrate for taking appropriate action