

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

+ **Crl.M.C.No. 1296/2009**

% Pronounced on: 6th January 2010

AMAR DEV SHASTRI Petitioner
! Through: Ms. Nandni Sahni, Adv.

versus

\$ STATE & ORS. Respondents
! Through: Mr. R.N. Vats, APP with
ASI Rakesh Tyagi, P.S. Patel Nagar.
Mr. Lajwinder Singh, Adv. for R-2 &
3.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **V.K. JAIN, J. (ORAL)**

1. This is a petition under Article 227 of the Constitution read with Section 482 of the Code of Criminal Procedure assailing the order dated 13th April, 2009 passed by the learned Addl. Sessions Judge, whereby the revision petition filed by the petitioner against the order of the learned Metropolitan Magistrate dated 30th September, 2008 was dismissed.

2. Vide an Agreement to Sell dated 17th January 2007, respondents 2 and 3 namely Kailash Kaur Sawhney and Mandeep Singh Sawhney agreed to sell property No. H-110 Shivaji Park, Punjabi Bagh (West),

New Delhi, to the petitioner, for a total sale consideration of Rs.1.8 Crore. A sum of Rs.5 Lacs was paid by the petitioner to them as earnest money. After entering into this Agreement to Sell, respondents 2 and 3 entered into another Agreement to Sell this property to one Ramesh Gupta on 12th February 2007, for a total sale consideration of Rs.1.85 Crore.

3. The grievance of the petitioner is that while agreeing to sell this property to him vide Agreement to Sell dated 17th January 2007, the respondents concealed two material facts (i) there was an order passed by Debt Recovery Tribunal on 16th February 2005, restraining Late Sh. Sohan Singh Sawhney, husband of respondent No.2 and father of respondent No.3 from alienating, disposing of, dealing with, parting with or creating any third party interest in respect of the subject property which had already been mortgaged with Union Bank of India and (ii) in Civil Suit No. 737/2005 an order was passed by this Court on September 21, 2005 directing Late Sh. Sohan Singh Sawhney to maintain status quo with regard to possession and title of property No. H-110 Shivaji Park, Punjabi Bagh (West), New Delhi.

4. A complaint dated 7th July 2008 was made by the petitioner to SHO Police Station Patel Nagar alleging therein that he had come to know that the Vendors Mandeep Singh Sawhney and Kailash Kaur Sawhney had concealed the above referred stay orders, passed by DRT and this Court, from him. Since no FIR was registered on the complaint lodged by the petitioner with the police, a criminal complaint filed by him before the learned Metropolitan Magistrate alleging commission of offences under Section 420/467/468/471/34 of IPC and seeking investigation and registration of FIR under Section 156(3) of the Code

of Criminal Procedure. The learned Metropolitan Magistrate, vide order dated 30th September 2008 found no dishonest intention on the part of the respondents and dismissed the complaint. The revision petition, filed by the petitioner, was dismissed by the learned Addl. Sessions Judge vide order dated 13th April 2009.

5. Admittedly, the respondents claim ownership of this property only through Late Sh. Sohan Singh Sawhney. It has been stated in the Agreement to Sell that Late Sh. Sohan Singh Sawhney had executed a Will on 20th April 2005 bequeathing the entire property to Sh. Mandeep Singh Sawhney and right of its use in her lifetime to Smt. Kailash Kaur Sawhney. Thus, the respondents are not only the legal heirs, but also the legal representatives of Late Sh. Sohan Singh Sawhney.

6. A perusal of the Agreement to Sell dated 17th January 2007 would show that it was disclosed by the respondents that property in question had been mortgaged with Union Bank of India and O.A. No. 93/2004 filed by the bank was pending before the Debt Recovery Tribunal. Since the property in question could not have been sold without redemption of the mortgage in favour of Union Bank of India, it cannot be said that concealment of the stay order passed by Debt Recovery Tribunal was such a material fact, that had it been in the knowledge of the petitioner, he would not have agreed to purchase the subject property. However, the order of status quo passed by this Court in Civil Suit No. 737/2005 on 21st September 2005 was a material fact since, Late Sh. Sohan Singh Sawhney could not have sold, assigned or parting with possession of aforesaid property to anyone so long as the order of status quo in force. The contention of the learned counsel for the respondents is that the order of this Court in Civil Suit

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No. 737/2005 was not in the knowledge of the respondents and that is why it was not disclosed in the Agreement to Sell dated 17th January 2007. As noted earlier, the respondents are not only the legal heirs, being his wife and son, respectively, they are also the Legal Representative of the deceased Late Sh. Sohan Singh Sawhney. Prima facie, it is difficult to accept that they were not aware of the order passed against Late Sh. Sawhney. In any case, whether they had actual knowledge of the status quo order dated September 21, 2005 or not, is a matter which requires investigation and at this stage it is not possible to say that the respondents did not have any knowledge about this order. In case the order passed by this Court on September 21, 2005 in Civil Suit 737/2005 was in the knowledge of the respondents and they did not disclose the order while entering into the Agreement to Sell with the petitioner and the order was otherwise not in the knowledge of the petitioner, prima facie, it would amount to cheating on the part of the respondents 2 and 3 at the time of executing Agreement to Sell in favour of the petitioner. May be, had the petitioner made efforts, he could have ascertained the status quo order passed by this court in CS(OS) 737/2005. But, that did not absolve the respondents of an obligation to disclose this order to the petitioner. In fact, they ought to have refrained even from entering into the Agreement to Sell, so long as the status quo was in force.

7. The learned counsel for respondents No. 2 and 3 states that the suit was dismissed as withdrawn on 30th March 2007. In my view withdrawal of a suit at a later date by itself would not show that there was no dishonest intention on the part of the respondents on 17th January 2007 when they agreed to sell property in question to the

petitioner. In case they were aware of the order passed by this Court and still chose not to disclose it and the order was otherwise not in the knowledge of the petitioner, it would be difficult to accept that there was no dishonest intention and consequently no cheating on their part. In any case, this is a matter, which can be ascertained only after investigation is conducted by the police.

8. It is well settled legal proposition that the defence which may be open to the accused, is not to be considered at this stage, and the matter has to be examined solely from the point of view of the complainant, on the basis of the allegations made in the complaint and the evidence produced by the complainant.

9. In '**Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi**' 1976(3) SCC 736, the Hon'ble Supreme Court while examining the scope of Section 202 of the Code of Criminal Procedure, inter alia, held as under:-

"It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the code of Criminal Procedure is extremely limited – limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint – (i) on the materials placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have."

10. For the reasons given in the preceding paragraphs, the impugned orders are hereby set aside and the learned Metropolitan Magistrate is directed to pass appropriate orders on the complaint filed by the petitioner in the light of the observations made in this order.

The petitioner is directed to appear before the learned Metropolitan

Magistrate at 10 AM on 25th January 2010.

One copy of this order be sent to the trial court for information and necessary action. Dasti also to the respondents, as requested by their counsel.

V.K.JAIN
(JUDGE)

JANUARY 06, 2010
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