
(1986) 02 KL CK 0031

In the High Court Of Kerala

Case No : Criminal M. C. 1105/85 and 13/86

Bharudan Dugar

APPELLANT

Vs

S I of Police and Others

RESPONDENT

Date of Decision : 11-02-1986

Acts Referred:

Penal Code, 1860 (IPC) — Section 378, 391, 395

Citation : (1986) 23 KLJ 235

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Advocate : A.B. Jaleel, for the Appellant; P.N. Ramakrishnan Nair, K.V. Sadananda Prabhu and R. Harikrishnan, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

K. Sreedharan J.

1. The petitioners in these cases are the trustees of a Trust called M/s. Dugar Finance Trust which is carrying on the business of Hire purchase Financiers in motor vehicles. The firm has its head office at Madras. In the course of their business the Trust entered into a hire purchase transaction with Sri. K. R. Vasudevan of Shertalai in respect of a contract carriage bearing registration No. K LY 9509. As per that agreement the Trust was the owner of the vehicle and Sri. Vasudevan the hirer. Since the hirer defaulted payment of the instalments to the tune of Rs. 92,000/- the Trust terminated the contract after giving notice to the hirer and repossessed the vehicle on 28-10-85 at about 6 a.m. The Trust thereafter filed O. S. 7904/85 before the City Civil Court at Madras and moved an application for injunction restraining the hirer the guarantor and persons claiming through them from interfering with the possession of the Trust over the vehicle. The court granted the order of injunction as prayed for. While so, the cleaner of the bus lodged a complaint before the Sub Inspector of Police, Muhamma at 3 p.m. on 20-10-1984 for offence punishable u/s 395 I. P. C. The police registered Crime 127/85. On the report of the police the Judl. IIInd class Magistrate,

Shertalai issued a search warrant on 24-10-1985 to search and seize the vehicle K L Y 9509. On 28-10-85 the hirer issued a notice to the Trust stating that he has already filed a suit before the Munsiff's Court, Shertalai for injunction restraining the Trust from taking away the vehicle. The petitioners moved the Sessions Court, Alleppey in Crl M. P. 864/85 for anticipatory bail. On 11-12-1985 the learned Sessions Judge granted their prayer. Subsequently the Sub Inspector of Police Muhamma filed Crl. M. P. 876/85 before the Sessions Court, Alleppey for cancellation of the anticipatory bail. On 18-12-1985 the learned Sessions Judge directed the petitioners to surrender the vehicle before the police. Petitioners have filed Crl. M. C. 1105/85 for quashing the above order. They have also filed Crl. M. C. 13/86 praying for quashing all further investigations in connection with Crime 127/85 of the Muhamma Police Station.

2. The Police have registered Crime 127/85 for offence punishable u/s 395 of the Indian Penal Code. The Section 395 prescribes the punishment for dacoity. As per Section 391 IPC dacoity is robbery committed or attempted to be committed by 5 or more persons. In all robbery there is either theft or extortion. The allegations now made before police must go to show that there was theft of the contract carriage KLY 9509. Theft is committed when a person intends to take dishonestly movable property out of the possession of another without his consent and moves it out of his possession. Thus in order to constitute the offence of theft it has to be established that there was an intention to take dishonestly and that the taking was without that person's consent. It is now well settled law that where a bona fide claim of right exists it can be a good defence to a prosecution for theft. In other words, an act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right, (Vide *Suvvari Sanyasi Apparao and Another Vs. Boddepalli Lakshminarayana and Another*,). In *Chandi Kumar Das Karmarkar and Another Vs. Abanidhar Roy, Hidayatullah, J.* (as he then was) speaking for the court observed:

The offence of theft consists in the dishonest taking of any moveable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as *animus furandi* and without it the offence of theft is not complete.

In this decision Their Lordships quoted with approval the following passage from 2 East P C 659:

If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal.

3. The vehicle involved in the case is covered by hire purchase agreement which is marked as Ext. PI. The Trust of which the petitioners are Trustees is described in this agreement as the owners of the vehicle. Sri. Vasudevan is termed as the hirer and Sri. Ramakrishnan as the guarantor. Clause 5 of this agreement allows the owners to terminate the contract of hiring with or without notice and

forthwith retake and recover possession of the vehicle. The first condition which allows the owners to retake possession is the default non payment of the monthly hire. Clause 7 of the agreement reads as follows:

7. (a) The Owners shall have the right to repossess the Motor vehicle together with all articles and goods or appurtenance, which may happen to be in or upon the Motor vehicle, at the time of such repossession; provided that all such articles found in or upon the Motor vehicle, not being the property of the Owners or of the Hirer shall be delivered to the proprietor thereof on furnishing proper proof of the same. The Hirer hereby agrees to indemnify the Owners any costs or legal liability that may incur in respect thereof.

(b) For purpose of inspection, repossession or attempted repossession of the Motor Vehicle, the Hirer hereby given irrevocable Leave and Licence to the Owners, their agents or any other persons employed or authorised by them to enter into any building, premises or place where the Motor Vehicle may be or supposed to be, and take possession of the same from the Hirer, or any other person using or possessing the same, without being liable to any suit or other proceedings by the Hirer or any person claiming under him. The Hirer shall be further liable for all expenses i.e. Travelling Expenses, Legal Charges, etc, of the Owners in obtaining repossession or attempting to obtain repossession of the Motor Vehicle.

(c) In the event of owner repossessing the Vehicle under any circumstances, the Hirer may request owner to revive the contract and apply for re-delivery of the Vehicle and such request may be considered by the Owner upon such terms and conditions which they think fit and proper in the circumstances.

4. There is no specific statute governing the rights and liabilities of parties to a transaction of hire purchase. The law allows the parties to have their own agreement in respect of various incidents of the hire purchase agreement. Parties are at liberty to provide in their agreement for particular situations and can prescribe the procedure with are to be adopted by them. Such provisions in the agreement if they do not contravene the provisions of the Indian Contract Act are lawful. Their Lordships of the Supreme Court in Sundaram Finance Ltd. Vs. State of Kerala and Another, had to consider the legal consequence of hire purchase agreements. It was observed in that judgment:

The agreement (hire purchase agreement) ignoring variations of detail, broadly takes one or the other of two forms:(1) When the owner is unwilling to look to the purchaser of goods to recover the balance of the price, and the financier who pays the balance undertakes the recovery. In this form, goods are purchased by the financier from the dealer, and the financier obtains a hire purchase agreement from the customer under which the latter becomes the owner of the goods on payment of all the instalments of the stipulated hire and exercising his option to purchase the goods on payment of a nominal price. The decision of this Court in K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore

III, dealt with a transaction of this character. (2) In the other form of transactions, goods are purchased by the customer, who in consideration of executing a hire purchase agreement and allied documents remains in possession of the goods, subject to liability to pay the amount paid by the financier on his behalf to the owner or dealer, and the financier obtains a hire purchase agreement which gives him a license to seize the goods in the event of failure by the customer to abide by the conditions of the hire purchase agreement.

A reading of Ext. P1 will clearly go to show that it will fall within the first category of the agreements referred to in the above quoted passage. It means, the Trust of which the petitioners are the Trustees is the owner of the vehicle KLY 9509.

5. Clause 7 of the agreement quoted above specifically authorises the owner to repossess the vehicle. Notices Exs. P2 to P4 and the telegram Ext. P5 prove beyond doubt that the petitioners were demanding remittance of the defaulted instalment amounting to Rs. 92,000/- and also of their intention to repossess the vehicle in pursuance of the terms of the agreement Ext. P1. Thus it is seen that the petitioners, in pursuance of the terms contained in Ext. P1 agreement terminated the contract of hire purchase and repossessed the vehicle as the owners of the vehicle. Then it cannot be said that the petitioners dishonestly moved the vehicle. Further once the hire purchase agreement was terminated the hirer was not legally entitled to be in possession of the vehicle and the petitioners as owners were entitled to possess the same.

6. The complaint was lodged not by the hirer but by his employee, the cleaner of the vehicle. The argument now advanced before me by the learned Public prosecutor is that the petitioners could not take the vehicle forcibly from the complainant who was not a party to Ext. P1 and whatever be the rights of the petitioners vis-a-vis the hirer those rights cannot be pressed into service as against the complainant. In this view it was argued that the petitioners have prima facie committed the offence of dacoity punishable u/s 395 IPC. I find it difficult to agree with this argument.

7. Clause 7 (b) quoted above allows the owners to repossess the vehicle from any other person using or possessing the same. An irrevocable licence has been granted to the owners to repossess it. Salmond in his treatise on Torts (1961 13th Edn. Page 804 Article 228) says:

Any person entitled to the possession of goods may retake the goods either peacefully or by the use of reasonable force from any person who has wrongfully taken or detained from him. Such a retaking even though forcibly is neither a civil injury nor a criminal offence.

Therefore it cannot be taken that the means employed by the petitioners to repossess the vehicle were unlawful because force was used.

8. By Clause 7 in Ext. P1 the owners were given an irrevocable licence to

repossess the vehicle. Such a licence tantamounts to the hirer's consent to the owner to repossess the vehicle. Therefore the taking of the vehicle in pursuance to that provision of the agreement cannot amount to taking without consent which is an ingredient of the offence of theft.

9. In *Sardar Trilok Singh and Others Vs. Satya Deo Tripathi*, Their Lordships of the Supreme Court had occasion to consider whether the Financiers seizing the vehicle on default in payment of instalment will subject himself to criminal prosecution. In that case the Financier during the absence of the hirer came to his house and forcibly under threat of arms removed the truck. Thereby the Financier was said to have committed various offences including the offence of dacoity. In such circumstances, Their Lordships observed:

We are clearly of the view that it was not a case where any processes ought to have been directed to be issued against any of the accused. On the well-settled principles of law it was a very suitable case where the criminal proceeding ought to have been quashed by the High Court in exercise of its inherent power. The dispute raised by the respondent was purely of a civil nature even assuming the facts stated by him to be substantially correct.

In the above case, it was contended before Their Lordships that the Financier's filing a petition before the High Court to quash the proceedings before the issuance of the summons was premature and that the High Court could not have quashed the same. This contention was repelled by the Court observing:

In our opinion the point is so wholly without substance that it has been stated merely to be rejected.

The learned Public Prosecutor appearing in the case raised a contention that this court at this stage should not interfere with the investigation of the case by the police. He submits that the complaint lodged by the cleaner of the vehicle prima facie brings out an offence and so this court should not exercise its inherent jurisdiction to quash the investigation. I find precious little in this argument. Earlier in this judgment I have come to the conclusion that the petitioners repossessing the vehicle KLY 9509 will not in any way satisfy any of the ingredients of theft as defined u/s 378 IPC. The only offence now alleged is the one punishable u/s 395. Therefore the further investigation if permitted will only go to harass the petitioners and it will be an abuse of the legal process. At this juncture I consider it advantageous to quote the following observations made by Their Lordships of the Supreme Court in *State of West Bengal and Others Vs. Swapan Kumar Guha and Others*, .

If, however, no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the Court zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for

establishing and proving an offence which is disclosed.

Since no offence is disclosed in the instant case, I am of opinion that the investigation has necessarily to be quashed. Accordingly, I allow these petitions and quash the entire proceedings in Crime No. 127/85 on the file of the Muhamma Police Station.