
(1966) 04 PAT CK 0017
In the Patna High Court

Fulel Singh and Another

APPELLANT

Vs

Srilal Yadav

RESPONDENT

Date of Decision : 15-04-1966

Acts Referred:

Constitution of India, 1950 — Article 227

Penal Code, 1860 (IPC) — Section 24, 26, 28, 378, 379

Citation : (1968) CriLJ 423

Hon'ble Judges : Kamla Sahai, J

Bench : Single Bench

Judgement

Kamla Sahai, J.—The petitioners are being tried for an offence u/s 379 of the Penal Code in the Court of Shri Partha Sharthi, a Munsif-Magistrate at Ranchi. The petitioners prayed that they should be discharged. They also prayed for calling for a document and for examination of some persons as Court witnesses u/s 540 of the Code of Criminal Procedure. The Munsif-Magistrate refused the prayers. The petitioners have, therefore, filed this application u/s 561A, of the Criminal P.C., and under Article 227 of the Constitution of India. They pray that the entire proceeding before the Munsif-Magistrate be quashed, and further that the order passed by him on the 22nd November 1965, be set aside.

2. It is necessary to give some facts. It seems that there was a hire-purchase agreement under which the company of the petitioners, viz., Autolite Financiers (P) Ltd., agreed to finance the purchase of a motor truck by one Heeyalal Yadav for Rs. 15,000. A truck was accordingly purchased and its registration number was B.R.J. 1315. In the petition of complaint filed by Srilal Yadav on the ground that he has been looking after the truck, he has alleged that Heeyalal paid Rs. 4,000 for the truck in cash, and he agreed to pay Rs. 1,000 to Petitioner No. 1 (one of the directors of the Company) every month until the entire price was paid off. Heeyalal went on paying Rs. 1,000 per month to petitioner No. 1 until the month of December, 1968, when petitioner No. 2 wrote to him that he had not till then received even the first installment. The complainant made an enquiry from Heeyalal who told him that, although he had paid the installment, petitioner

No. 1 had not granted him receipts. Consequently, money started being sent to petitioner No. 2 by Bank draft. In May, 1964, both the petitioners approached Heeyalal, and asked him to make up-to-date payments. Heeyalal said that he was perfectly willing to pay the amounts due from him provided receipt was granted to him for payments already made. The petitioners went away, saying that petitioner No. 2 would send the receipts from Delhi after consulting his books of account.

3. The story given in the petition of complaint further is that petitioner No. 1 and his men forcibly removed the truck from the road when the driver was taking tea in a shop at Booty on the 3rd June, 1964. On receipt of this news from the driver the complainant and Heeyalal went to the petitioner No. 1 in order to find out the reason for forcible seizure of the truck. Petitioner No. 1 told them that his instructions from petitioner No. 2 were not to release the truck until payment of the entire amount due from Heeyalal. The complainant and Heeyalal kept on telling petitioner No. 1 that they were always prepared to pay the entire amount due if up-to-date receipts for payments made were granted to them. On the 3rd October, 1964, the complainant went to petitioner No. 1 and again requested him to give back the truck. He offered to pay the actual dues even against kacha receipts; but petitioner No. 1 said that he was going to Delhi, and that, when he returned after a talk with petitioner No. 2, the complainant should see him on the 29th October, 1964. On the 29th October, the complainant as well as Heeyalal went to petitioner No. 1 and then learnt from him that he would not return the truck to them but would sell it to another person.

4. On the above allegations, the complainant filed his petition of complaint in the Court of Sub-divisional Magistrate at Ranchi on the 30th October, 1964. After examining him on solemn affirmation, the learned Magistrate sent the matter for enquiry u/s 202 of the Criminal P.C. The enquiring Magistrate reported that a prima facie case had been made out against both the petitioners. On a consideration of this report, the Sub-divisional Magistrate took cognizance of the case on the 15th February, 1965.

5. In due course, the case was transferred for trial to Shri Parth Sharthi.

6. The petitioners produced a letter purporting to be one written by Heeyalal whereby he made ft surrender of the truck to the petitioners. They also filed a document which purported to be the hire-purchase agreement. Heeyalal and the complainant thereupon denied the genuineness of the signatures on the two documents, and prayed that they should be kept in safe custody for examination by the hand-writing expert. This was allowed, and the documents were ordered to be kept in safe custody.

7. The petitioners filed a petition, submitting that no case had been made out against them and praying that they should be discharged. The learned Munsif-Magistrate heard the parties, and by his order dated the 3rd August, 1965, he stated that several questions had to be considered in the case, including

"whether the accused had a right to retake possession, whether he could be said to have acted in the bona fide belief of having such a right, whether the truck has been taken with the consent of the purchaser (on the basis of the letter of surrender) or whether the letter of surrender is genuine or not." He was thus of the view that this was not a case in which the petitioners could be discharged at that stage. He, therefore, dismissed their petition. The matter rested there because they did not move any higher Court.

8. Some witnesses were thereafter examined on behalf of the complainant, and the case was to be put up on the 22nd November, 1965, for consideration of the question whether Charge should be framed u/s 254 of the Criminal P.C. against the petitioners. They had filed one petition on the 22nd September, 1965, praying that, inasmuch as the complainant had not produced the hire purchase agreement, the document should be called for from the Transport Department and the guarantors should be summoned u/s 540 of the Criminal P.C. and should be examined. They had also prayed that no charge should be framed against them, and that they should be discharged. The learned Magistrate considered their petitions in his order of the same date, i.e., the 22nd November, 1965. He said that it was not open to him to summon witnesses u/s 540 before framing charge u/s 254. He also said that, for reasons given by him, no order discharging the petitioners could be passed at that stage. He, therefore, rejected the petitioners' petitions. It is after this stage that the petitioners have come up to this Court with the present application.

9. In my opinion, the petitioners have shown great, impatience, and the result is that their trial is being unnecessarily prolonged. Since their previous prayer for discharge was rejected by the order dated the 3rd August, 1965, and since they did not move higher Courts against that order, I do not think that their action in pressing a similar prayer only two or three months later is legally justified. Mr. Bindra, who has appeared in this Court on their behalf, has not made reference to any part of the prosecution evidence recorded against them in order to show that something fresh has transpired which could form the basis of fresh consideration by the trial Court on the question of their discharge. It seems to me that, instead of a stopping their trial at this stage, the petitioners I should have co-operated with the Court so that I their trial could be expeditiously concluded.

10. Mr. Bindra has, however, argued that this is a fit case in which this Court should exercise its inherent power u/s 561A at this stage in order to discharge the petitioners. In this connection, he has relied upon R.P. Kapur Vs. The State of Punjab, . Gajendra gadkar, J. (as he then was), who delivered the judgment of the Court, has laid down several principles in that case. The first principle to be noticed is that, ordinarily, a criminal proceeding, which has been instituted against an accused, must be tried under the provisions of the Code, and the High Court should be reluctant to inter fore at an interlocutory stage.

This is what should, generally, be allowed to happen. Interference by the High

Court in an interlocutory stage must be rare. Another principle to be noticed is that the inherent power should not be exercised with regard to matters specifically covered by the provisions of the Code. The third principle is that there are certain categories of cases in which the High Court may interfere by quashing the proceeding at an inter, locutory stage if it feels that further continuance of those cases would amount to an abuse of the processes of the Court. It is neither prudent nor possible to lay down any inflexible rule as to circumstances in which the High Court can exercise its inherent power, and his Lordship has, therefore, refused to lay down any such rule. He has, however, referred to some categories of cases in which the High Court may interfere.

11. The first category of such cases is where there is some legal bar to the trial of the case in question. No useful purpose can be served by the continuance of the trial of such a case because it is bound to fail on account of the legal bar. Another category of cases is that in which, assuming that all the statements made in the petition of complaint or the first information report are correct, no offence is made out against the accused. The third category of such cases may be described in his Lordship's own words as follows:

A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction u/s 561A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained.

12. Mr. Bindra has conceded that the present case does not come under the first category because there is no legal bar to the trial of the petitioners by the Munsiff-Magistrate in this case. He has, however, urged that this case comes under the second and third categories. I may first deal with his arguments in relation to the second category of cases. He has submitted that the allegations made in the petition of complaint, even if they are assumed to be absolutely correct do not make out a case of theft against the petitioners. His argument is that, admittedly, there was a hire purchase agreement between the parties. It must be necessarily assumed, he says, that the petitioners' company remained the owner, and Heeyalal was merely in the position of a bailee. That being so, the element of dishonest intention on the part of the petitioners is lacking. He has

also argued that the circumstances of this case make out that the removal of the truck by the petitioners was with the implied consent of Heeyalal and the complainant.

13. The definition of "theft" shows that the intention of the offender must be to take the moveable property dishonestly. u/s 24 of the Penal Code, the intention to act dishonestly means the intention to cause wrongful gain to one person or wrongful loss to another. Section 28 defines "wrongful gain" as "gain by unlawful means of property to which the person gaining is not legally entitled". It defines "wrongful loss" as "the loss by unlawful means of property to which the person losing it is legally entitled". Mr. Bindra has argued that it cannot be held that there is an intention to act dishonestly if an alleged offender or offenders has acted in bona fide exercise of a claim of right. In this connection, he has relied upon Chandi Kumar Das Karmarkar and Another Vs. Abanidhar Roy, . Hidayatullah. J., who has delivered the judgment of the Court in that case, has observed:

A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. "This Court in Suvvari Sanyasi Apparao and Another Vs. Boddepalli Lakshminarayana and Another, observed as follows:

It is settled law that where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right. By the expression "colour of legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however weak. This Court observed in the same case that the law was stated in 2 East P.C. 659 to be:

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.

14. The difficulty in the way of Mr. Sinha in this case is that he has come to this Court at an interlocutory stage. His argument pertaining to the second category of cases has, there, fore, to be considered on the assumption that the entire case put forward in the petition is true. The complainant has stated in that petition that Heeyalal was paying the installments which fell due, and that he was always prepared to pay the amount due from him on the only condition that he was granted receipts for payments made by him. The petitioners did not grant receipts, and even a request of Heeyalal and the complainant for grant of kacha receipts was not listened to. In view of the fact that petitioner No. 2 had stated to Heeyalal that no installment had been paid, it was impossible for Heeyalal, if he had really paid installment as and when they fell due and if he had not really got receipts as alleged by the complainant, to continue to pay the amounts which became due for payment to the petitioners without getting some sort of acknowledgment of receipt.

On the case made out in the complaint he was not at all at fault. The default in payment by him was the direct consequence of the act of the Petitioners themselves in not granting receipts. That being so, the petitioners cannot be said to have had any bona fide claim of right to seize the truck for such a default. The position comes to this that the petitioners' act in taking the truck was in exercise of a false pretence and not a fair pretence. On the facts stated in the complaint - if they are assumed to be true-therefore, I am unable to hold that the element of dishonesty is lacking in this case.

15. So far as the question of "consent is concerned, Mr. Bindra has urged that the fact that the complainant made a delay of several months in filing the complaint shows that he and Heeyalal consented to the removal of the truck. In my opinion, this argument cannot be accepted as correct. The complainant has explained in the complaint that he and Heeyalal went on trying to conclude the matter amicably by offering to pay the petitioners all dues up to this even if the petitioners gave them kacha receipts. He had indicated that he has filed the complaint only when he found that the matter could not be concluded on the basis of an amicable settlement. No assumption can, therefore, be made that the delay was due to any consent on the part of the complainant or Heeyalal to the removal of the truck by the petitioners.

16. I proceed now to consider whether the present case comes under the third category of cases referred to by Gajendragadkar, J. I must state at the very outset that there is a very narrow distinction between a case in which it can be said that the evidence is manifestly and clearly inconsistent with the accusation on one side and a case in which it may be said that the High Court has embarked upon an enquiry as to whether the evidence in question is reliable, on the other. However, it is not necessary in this case to consider this distinction because all that Mr. Bindra has argued is that there is no legal evidence in this case to support the accusation against the petitioners.

He has based this argument only upon the fact that the prosecution has not brought into evidence the hire-purchase agreement or the terms and conditions of that agreement. It is true that the prosecution has not yet put in these pieces of evidence; but, if charge is framed for an offence of theft against the petitioners, the complainant can produce them later. It will certainly be a good thing for the Court to be in possession of evidence relating to the agreement before it has to pronounce judgment; but, so far as I can see at present, the fact that, according to Mr. Bindra, the agreement shows that the petitioners' company has remained the owner of the truck is not extremely important. It is manifest that even an owner can be guilty of theft, in certain circumstances, moveable property which he owns. For example, Heeyalal was, admittedly, in possession of the truck in so far as this case is concerned. The petitioners may have been perfectly entitled in certain circumstances, to get possession of the truck; but, if they have taken advantage of default in payment caused by their own act of refusal to grant receipt, that must necessarily be held to be an act

done dishonestly. Even if they are shown to be the owners, therefore, that will avail them nothing. I may refer in this connection to illustrations (j) and (k) to Section 378 of the Penal Code. I am, therefore, unable to accept the contention that the petitioners are entitled to be discharged at this stage simply because the terms and conditions entered into between the parties have not been put in evidence. As I have said, they may well be proved later.

17. The next argument which Mr. Bindra has put forward is that there is, at least, no case to be tried against Sardara Singh (petitioner No. 2) This argument is based upon the fact that the allegation against this petitioner in the petition of complaint are a little vague. Mr. Bindra has referred to paragraphs 3, 4 and 8. In paragraph 8, the complainant has stated that accused No. 1 forcibly snatched away the truck, and, when he and Heeyalal went to petitioner No. 1, he said that his instruction from petitioner No. 2 was not to release the truck untill all dues up to date had been paid with overdue interest. Mr. Bindra has contended that this shows that petitioner No. 1 alone was at Ranchi, and petitioner No. 2 was not there. It has, however, not been stated when the complainant and Heeyalal went to petitioner No. 1 for demanding return of the truck. It may be that they went to him a few hours later, and, in the meantime petitioner No. 2, left Ranchi.

18. In paragraph 4, the complainant has said that, when he spoke to petitioner No. 1, he again refused to grant receipt or a true copy, of the-account book but said that he would write to petitioner No. 2 and seek his instructions. This must have happened sometime after the occurrence. It cannot be assumed that, simply because petitioner No. 2 was not in Ranchi at that stage and a letter had to be written to him, he was not there with petitioner No. 1 even at the time when they took possession of the truck by force.

19. In paragraph 8, the complainant has stated that Petitioners Nos. 1 and 2 committed breach of trust with respect to Rs. 9,000/., and petitioner No. 1 also committed theft of truck and petitioner No. 2 acted with petitioner No. 1 in furtherance of common intention to commit theft, I am unable to understand why an allegation of breach of trust has been made; but, so far as the allegation of theft is concerned, the language of paragraph 8 is not very clear as to whether petitioner No. 2 was present when, in furtherance of the common intention of both to commit theft, petitioner No. 1 actually removed the truck while the driver was taking tea. It is admitted by Mr. Bindra that the evidence adduced the complainant before the enquiring officer as well as the evidence adduced before the Munsif-Magistrate, who is trying the case, show that both the petitioners were present together at the time when the truck was removed from the road where the driver had left it. That being so, I am unable to hold at this stage that there is no case to be tried against petitioner No. 2.

20. In the circumstances mentioned above, I do not think that this is a fit case in which I should exercise my inherent power to quash the trial against the petitioners.

21. Another branch of Mr. Bindra's argument, however, is that the order passed by the learned Munsif-Magistrate is bad, and that, in exercise of my power under Article 227 of the Constitution, I should set it aside. It does seem to me that the Magistrate has made a slight error. He is wrong in saying that it was not open to him to take other evidence before framing charge u/s 254 of the Code. Section 253 reads:

253(1) If, upon taking all the evidence referred to in Section 26 a and making such examination (if any) of the focused as the Magistrate thinks necessary, be finds that no case against the accused has been made out which, if unrequited, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to present a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

The Magistrate was of the opinion that, since this section speaks only of evidence taken u/s 252 and examination of the accused, if any, he was not entitled to take any evidence other than that which was adduced u/s 252. This section has, however, to be read with Section 540 of the Code which runs:

Any Court may, at any 3tape of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

The first point which can be noticed is that the Court can exercise the power given to it under this section at any stage of an enquiry or trial. That means that the Court can exercise this power even before it exercises its power u/s 258 or 254 of the Code. That is the reason why I have said that the Magistrate has committed an error. He should have held that he could exercise his power u/s 540 even before the stage of Section 253.

22. Section 540 is evidently divided into two parts. The first part gives a discretion to the Court to do the acts mentioned therein. The second part makes it necessary for the Court to exercise the powers given to it if the evidence of the person concerned appears to it essential to the "just decision of the case". This is not the stage when the Court must exercise the power given by the second part of the section. It has to exercise those powers before it has to arrive at a decision if it thinks that it is necessary for it to exercise the powers for a "just decision of the case". At the present stage, it was not at all necessary for decision whether a charge should or should not be framed against the petitioners that the Magistrate should either call foe the hire purchase agreement from the Transport Department or he should summon and examine the guarantors. In my judgment, there was no necessity at this stage for the Munsif-Magistrate to accede to the prayers of the petitioners, invoking his powers u/s 540. That being

so, I do not think that the Magistrate's order refusing to summon the witnesses and to call for the hire-purchase agreement is erroneous in law. Hence, I am unable to set aside his order in exercise of my power under Article 227 of the Constitution.

23. For the reasons given above, the application fails, and it is dismissed. I wish to make it clear, that the Munsif-Magistrate should not allow himself to be influenced in his decision of the case by anything which I have said in this judgment.