
(2007) 05 MP CK 0059

In the Madhya Pradesh High Court

Case No : Criminal Rev. No. 627 of 2006 and M. Cr. C. No. 2127 of 2006

Goyal M.G. Gases Pvt. Ltd. and another

APPELLANT

Vs

Kamaljeet Singh Bhatia and another

RESPONDENT

Date of Decision : 18-05-2007

Acts Referred:

Contract Act, 1872 — Section 170

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 397, 401, 482

Penal Code, 1860 (IPC) — Section 405, 407, 424, 425

Citation : (2007) 4 MPLJ 80

Hon'ble Judges : Subhash Chandra Vyas, J

Bench : Single Bench

Advocate : S.K. Vyas, with L.S. Chandiramani in Cri. Rev. No. 627 of 2006 and Vivek Dalal in M. Cr.C. No. 2127 of 2006, for the Appellant; Vivek Dalal in Cri. Rev. No. 627 of 2006 and S.K. Vyas with L.S. Chandiramani in M. Cr.C. No. 2127 of 2006, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Vyas, J.

The above referred Criminal Revision and petition u/s 482 of Criminal Procedure Code have arisen out of the same order passed by learned Judicial Magistrate First Class. As common question of fact and law is involved in these cases, therefore, they have been heard and are being decided together by this common order.

The Criminal Revision has been filed by the complainant u/s 397 read with section 401 of the Criminal Procedure Code feeling aggrieved by the order passed by Judicial Magistrate First Class, Mhow in Criminal Case No. 431/06 on 22-3-2006, wherein learned Trial Magistrate has refused to take cognizance of the offence punishable u/s 407 of the Indian Penal Code against respondents and only cognizance of the offence punishable under sections 424 and 425 of the Indian Penal Code has been taken. M.Cr.C. 2127/06 is a petition filed by the

accused persons u/s 482 of Criminal Procedure Code for quashment of the same order of issuance of process against them passed in that criminal case, pending before Judicial Magistrate First Class, Mhow.

Short facts of the case as narrated in criminal revision are that the applicant (complainant) company is engaged in a business of manufacturing Industrial Gases and has its head office at Delhi and Branch Office at Nagda, (Ujjain) and other cities in the country. Respondent M/s M.P. Maharashtra Road Lines was engaged for transporting gas cylinders to various industries. Respondents were entrusted to transport cylinders of hydrogen gas from Nagda to Kanpur and Noida and at the relevant time 262 and 290 cylinders respectively were transported by the trucks of the respondent with instructions to bring back empty gas cylinders from Kanpur and Noida. After delivery of full cylinders, for refilling 277 empty cylinders were collected from Kanpur and 290 cylinders were collected from Noida on 17-7-2005 and 21-7-2005 by the respondents for being transported to Nagda and to be delivered to the applicant company for refilling but the delivery of the said empty cylinders after entrustment was not made within the stipulated period of time and when inquiry was made, no satisfactory reply was given by the respondents. Thereafter a complaint was made at police station Bhanwarkuwa Indore on 15-9-2005 by the applicant (complainant) but no action was taken by the police also. Applicants company officials came to know that the cylinders had been kept by the respondent/accused company at their petrol pump, situated at Gram Sovay, Tehsil Mhow and this fact was admitted by accused respondents company. Each empty cylinder costs Rs. Six thousand and in all the respondents/accused persons have in their possession 567 empty cylinders, costing Rs. Thirty Four Lakhs Two Thousand. The cylinders have been detained by the respondents/accused persons with a view to cause wrongful loss to the applicants company and to have wrongful gain and thereby they have committed the offence of criminal breach of trust being entrusted with the property as a carrier. When a private complaint was filed before Judicial Magistrate First Class, then vide order dated 19-12-2005, trial Court refused to take cognizance and dismissed the complaint. That order was challenged by the present applicants before the Court of Additional Sessions Judge, Mhow by way of a Criminal Revision. That Revision was allowed and trial Court was directed to take further evidence and to hold further inquiry into the matter and to take cognizance of the offence as per the provisions of law. Thereafter again learned Judicial Magistrate First Class hold further inquiry and then took cognizance of the offence punishable under sections 424 and 425 of the Indian Penal Code only against the respondents/accused persons and refused to take cognizance of the offence punishable u/s 407 of the Indian Penal Code. That order passed by Judicial Magistrate First Class is impugned in this Criminal Revision and petition u/s 482 of Criminal Procedure Code filed by the accused persons.

Learned Senior Counsel, Shri S.K. Vyas appearing for the applicant complainant submitted that all the ingredients of the offence punishable u/s 407 of the Indian Penal Code are fully made out in the facts of the case. He has took this Court

through the statements given by complainant and his witnesses under sections 200 and 202 of the Criminal Procedure Code and also the averments made in the complaint itself and submitted that learned Trial Judge has not properly appreciated the evidence of complainant Ajay Dholi and also the complaint which prima facie makes out a case u/s 407 of the Indian Penal Code as there has been criminal breach of trust by a carrier. He further submitted that the learned Trial Magistrate has erred in looking to the proposed defence of the accused Transport Company without there being any provision in law to do so. He further submitted that the motive of the respondent accused company from the very beginning has been to defraud the applicant company and for this purpose the empty gas cylinders have been detained by the accused respondents dishonestly to cause a wrongful loss to the applicant company. He submitted that the respondents/accused persons have also tried to create false defence by making an application on 18-7-2005 at police station Kishanganj wherein it is stated that the accused transport company was going to detain seven trucks of the empty gas cylinders of the applicants company because the applicants company is not paying the freight charges in spite of constant demands.

Learned Senior Counsel for the applicants submitted that respondents accused persons were carriers and were duty bound to deliver the empty gas cylinders at the office of applicants company at the stipulated time and they have failed to discharge the trust created in them by not delivering the property.

Per contra learned counsel for the respondents, Shri Vivek Dalal, Advocate submitted that section 170 of the Indian Contract Act is applicable in the facts of the present case and the capacity of the respondents accused persons was that of bailee only and they have a right to retain the goods until they receive due remuneration for the services which they have rendered in respect of that. He submitted that there is no occasion of misappropriation of the property because the cylinders are in safe custody of the respondents/accused persons and have been retained by them only for the purpose of recovery of their due remuneration and in this regard, advance intimation was also given at police station Kishanganj.

I have considered the rival contentions raised by learned counsel for both the parties. I have also taken into consideration the averments made in the complaint and the statement given by the witnesses u/s 200 and 202 of Criminal Procedure Code.

To appreciate the facts of the case it is necessary to consider the provisions of section 405 of the Indian Penal Code wherein the offence of criminal breach of trust has been defined. As per this provision, anybody whoever, being in any manner entrusted with property, or with any dominion over that property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such

trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

This definition clearly shows that for the purpose of establishing an offence of criminal breach of trust, following facts are required to be proved :

1. That the accused must be entrusted with property or with dominion over property.

The person so entrusted must

(a) dishonestly misappropriate or convert to his own use that property; or

(b) dishonestly use or dispose of that property or wilfully suffer any other person to do so

(i) In violation of any directions of law prescribing the mode in

which such property is to be discharged : (ii) any legal contract made touching the discharge of such trust.

In addition to this, for the purpose of proving offence punishable u/s 407 of the Indian Penal Code, which is an offence of criminal breach of trust by a carrier etc., it is further required to be proved that

1. That the accused was so entrusted as a carrier, wharfinger or warehouse keeper and committed criminal breach of trust in respect of that property.

In the facts of present case it is clear that respondents accused persons were carrier. So one of the requirement of section 407 of the Indian Penal Code prima facie appears fulfilled. He was also entrusted with the property that is empty gas cylinders and those cylinders were to be delivered to the applicant company by him, in terms of the legal contract. It is also clear that cylinders have not been so delivered by the respondents accused and have been retained in their possession so prima facie it appears that by retaining the property which was entrusted for the purpose of delivery at a particular place and time accused respondents are causing wrongful loss to the applicants and the intention can also be said prima facie dishonest. The facts of the present case are like illustration (f) of section 405 of the Indian Penal Code.

At this stage it is not necessary to consider the evidence of the respondents accused while considering the question whether prima facie case has been made out against them or not. The test to be applied while considering the question that accused should be summoned or not is whether there are sufficient ground for proceeding against them. The sufficiency has to be judged from the complaint, the solemn affirmation and the evidence, if any on record. The defence of the accused is not a material which has to be considered in the matter while taking cognizance. At the stage of cognizance for the statement or evidence should not be sifted and no attempt should be made to find out by critical appreciation if the alleged statement against the persons are true or not.

Yet for the purpose of taking cognizance the Court is bound to apply the standards strictly to find out if the material alleged against the accused are sufficient to make out a prima facie case of the offences alleged to have been committed by them. The Magistrate has been given discretion in the matter and the same has to be exercised by him judicially. Learned Trial Magistrate while considering the offence of section 407 of the Indian Penal Code has expressed his opinion that the intention of accused persons for retaining cylinders was to recover freight charges and on this consideration he proceeded for the offence punishable under sections 424 and 425 of the Indian Penal Code only, holding that with these acts respondents have simply committed mischief and fraudulently or dishonestly removed or concealed the property of the applicants. This view of the learned Magistrate appears erroneous in the facts of the case which clearly shows that empty gas cylinders were entrusted to the respondents and thereby a trust was created, thereafter respondents accused persons who were entrusted with empty gas cylinders have retained those cylinders and this act appears prima facie an offence being contrary to the implied contract touching discharge of such trust and causing a wrongful loss to the present applicants complainant.

The defence of accused persons, which have been considered by learned Magistrate in the impugned order, was not required to be considered at this stage because there was no occasion to consider such plea of defence at this stage and no evidence was lead by anyone to show these facts.

So far as M.Cr.C. No. 2127/06 is concerned, the registration of the case, is mainly challenged on the ground that under the provision of section 170 of the Indian Contract Act accused persons were acting and it has been argued that respondents/accused persons of the criminal revision and petitioners of M.Cr.C. No. 2127/06 were having a right in law to retain the property. But as discussed hereinabove, this is only a defence available to the petitioners and the defence can only be considered at appropriate stage during trial. The question which have been raised by petitioners of M.Cr.C. No. 2127/06 are questions of facts and for the purpose of appreciating these questions, agreement between the parties and actual dues of the petitioners against the complainant and application of provisions of section 170 of the Contract Act are required to be taken into consideration. It is worth mentioning here that the order by which learned Additional Sessions Judge remitted the case back to the trial Court after expressing the opinion that the defence which have been raised by the accused persons are to be considered at an appropriate stage and not at the stage of registration of the case, was challenged by these accused persons petitioner by way of criminal revision before this High Court and the same was got dismissed saying that it has become infructuous and therefore the accused persons cannot be permitted to raise this same question again before this Court unless they are adjudicated by learned Trial Magistrate during the course of the trial.

Therefore the petition filed by the accused persons u/s 482 of Criminal Procedure

Code has got no force and is liable to be dismissed.

After thoroughly considering the averments made in the complaint and the statement given by the complainant and his witnesses, this Court is of the considered view that learned Trial Magistrate has committed an error in not properly appreciating the averments made in the complaint and evidence of the complainant and in not finding a prima facie case u/s 407 of the Indian Penal Code. Therefore this Revision succeeds and is allowed.

Learned Trial Magistrate is directed to proceed against the respondents for the offence punishable u/s 407 of the Indian Penal Code also and to take into consideration the defence of the respondents at the appropriate stage of trial and not at the threshold of the matter.

Resultantly the application of Revision filed by complainant is allowed and the petition filed by accused persons u/s of 482 of Criminal Procedure Code is hereby dismissed.