(2019) 07 BOM CK 0031

In the Bombay High Court

Case No : Criminal Writ Petition No. 2269 Of 2015

Guma Tech Marine Services APPELLANT

Vs

State Of Maharashtra And Ors RESPONDENT

Date of Decision : 04-07-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 156(3), 190(1)(b)
Indian Penal Code, 1860 — Section 34, 406, 408, 420, 464, 467

Citation : (2019) 07 BOM CK 0031

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Moni Chinmoy, Sachin Kadu, Harshal Suryawanshi, DR. Nilesh Pawaskar, Ores Siddiqui, Somnath Sahu, Sakina Kanchawala, G.P. Mulekar

Final Decision : Disposed Off

Judgement

1. Rule. Rule made returnable with consent of the parties and heard.

2. The brief facts leading to the filing of the present petition are as under:Â?

It is the case of the petitioner that the petitioner had appointed Late Satyendrababu Saxena as the General Manager (who is Respondent No. 4) of the

petitioner firm on 20.01.2009, and he was thereafter handling the day to day affairs of the new workshop being Gala No. 71, ground floor, Hasti

Industrial Estate, Mahape, New Mumbail. The petitioner shifted from its workshop at Gala No. 71, Ground Floor, Hasti Industria Estate, Mahape,

New Mumbai to the new address being 10ÂB/1, Saniya Industrial Estate, Kaman Bhiwandi Road, (opp. Sagar hotel), Vasai 401208. The petitioner

had purchased generator from a company called M/S C.S. Diesel Engineering Pvt. Ltd. for its workshop at Vasai in February 2010. In lieu of booking

the said generator with M/s C.S. Diesel Enginnering Pvt. Ltd., the petitioner had given an initial booking deposit money of Rs. 50,000/Â to the said

M/s. C.S. Diesel Engineering Pvt. Ltd. After making the full payment of the price of the said generator, the said company namely M/s. C.S. Diesel

Engineering Pvt. Ltd. had issued a cheque bearing no. 118751 dated 11.03.2010 of an amount of Rs. 50,000/Â favouring M/s. Guma Tech Marine

Serviceds, the petitioner herein, and the said cheque was issued towards refund of the initial booking amount of Rs. 50,000/Â paid by the petitioner

firm to M/s. C.S. Diesel Enginnering Pvt. Ltd. Thereafter, Respondent No. 4 in the capacity of the General Manager of the petitioner firm, took the

said cheque from Mr. Baby Kunju, the employee of the petitioner firm who had collected the said cheque from M/S. C.S. Diesel Enginnering Pvt.

Ltd., on the pretext that Respondent No. 4 would deposit the said cheque in the account of the petitioner firm.

3. It is the case of the petitioner that the petitioner firm is having bank accounts only with three banks namely ING Vysya Bank, Bhavnagar, Bank of

India, Bhavnagar and Axix Bank, Malad Branch, Mumbai. Moreover the petitioner firm is catering to the needs of the shipping industry since a long

time and almost 90% of the business of the petitioner firm is in the nature of export. Thereafter, Respondent No. 4 after taking the said cheque of Rs.

50,000/Â neither informed any of the partners of the petitioner firm nor any of the employees of the petitioner firm about the said cheque. It was only

when M/s. C.S. Diesel Engineering Pvt. Ltd., demanded the C Form from the petitioner firm, that the accountant of the petitioner firm namely Mr.

Deepak Chavda, demanded the invoice of the said transaction in order to verify the same from the records. After detailed examination and

reconfirmation from M/s. C.S. Diesel Engineering Pvt. Ltd., it was revealed that Respondent No. 4 had taken away the said cheque bearing no.

118751 dated 11.03.2010 of an amount of Rs. 50,000/Â favouring M/s. Guma Tech Marine Services, the petitioner herein, on the pretext that the

same would be deposited in the account of the petitioner firm. Thereafter, the petitioner firm acting through its partner Mr. G.V. Seetharam, tried to

find out the details pertaining to the encashment of the said cheque bearing no. 118751 dated 11.03.2010 issued by M/s. C.S. Diesel Engineering Pvt.

Ltd. It was revealed that the said cheque had been encashed in the State Bank of India, Hughes Road Branch, MumbaiÂ 400007. Thereafter, the petitioner firm, acting through its partner Mr. G.V. Seetharam, tries to find out as to how the said account payee cheque favouring the said firm could

have been encashed at the State Bank of India, Hughes Road Branch, Mumbai 400007 when the petitioner firm had no account in the said bank.

Upon further enquiries it was revealed that the Respondent No. 2 was working as a Deputy Manager in the said State Bank of India, Hughes Road

Branch, MumaiÂ 400007 and an account in the name of the petitioner firm had been opened in the said branch of the State Bank of India and the said

account had been opened without the consent, authority and instructions from the petitioner firm. The petitioner firm, acting through its partner Mr.

G.V. Seetharam, tried to take out more information from the said branch of the State Bank of India, however, the Respondent No. 2, being the Deputy

Manager at the said branch, deliberately withheld vital information which could have thrown light on the guilt of the Respondent No. 2, 3 and as also

Late Satyendrababu Saxena. Left with no other alternative, the petitioner firm, acting through its partner Mr. G.V. Seetharam, filed a complaint in the

Gamdevi Police Station, Mumbai on 12.02.2011.

4. Thereafter, Gamdevi Police Station failed to act on the said complaint of the petitioner firm and as such the petitioner firm was constrained to

approach Hon'ble High Court, and filed Writ petition no. 1396/2011. This Court, vide order dated 05.07.2011, was pleased to dispose off the writ

petition with liberty to the petitioner to approach the Court of Metropolitan Magistrate by way of filing a private complaint. Accordingly, petitioner filed

a complaint bearing C.C. No. 108/SW/2011 in the court of the Ld. Additional Chief Metropolitan Magistrate, 40 th Court, Girgaon, Mumbai.

Thereafter, despite the fact that substantive offences against the Respondent Nos. 2, 3, & 4 were made out on the basis of the investigation carried

out by the concerned investigating officer, the concerned police station, vide report dated 07.01.2013, filed a report stating that the accusation made by

the petitioner firm are false, and sought dismissal of the said case under B summary.

Thereafter, the Ld. Additional Chief Metropolitan Magistrate, 40th Court, Girgaon Mumbai vide order dated 13.03.2013 was pleased to reject the final

report submitted by the Gamdevi Police Station and took cognizance under Section 190 (1) (b) of Cr.P.C. for commission of offences under Section

406, 408, 420, 464, 467 read with Section 34 of IPC against the Respondent Nos. 2, 3 and 4.

5. Thereafter, the Respondent No. 2, 3 and 4 chose to file a criminal revision application bearing no. 421/2013 before the Sessions Court at Mumbai.

According to the petitioner, the Ld. Sessions Court without appreciating the facts in the correct perspective and in total contravention of settled judicial

precedents vide order dated 277.04.2015, was pleased to partly allow the said revision application.

6. Learned counsel appearing for the petitioner submitted that the Ld. Sessions Judge erred in law and in fact in arriving at a conclusion that the

cheque of Rs. 50,000/Â was received by respondent no. 4 from M/s. C.S. Diesel Engineering Pvt. Ltd., in the capacity of General Manager of the

petitioner firm. The respondent no. 4 took away the said cheque with an ulterior motive, when it was not the part of the duties of the respondent no. 4,

in the capacity of the General Manager of the petitioner firm, to deposit cheques. However the said aspect could have been adjudicated only during

the trial of the criminal case and as such the Ld. Sessions Judge ought not have imposed its conclusion regarding the acceptance of cheque by

respondent no. 4 in the capacity of General Manager of the petitioner firm from M/s. C.S. Diesel Engineering Pvt. Ltd.

7. It is further submitted that, the Ld. Sessions Judge erred in law and in fact in holding that offences punishable under Section 464 & 467 of the

Indian Penal Code, 1860 are not disclosed, when the Ld. Sessions Judge had itself recorded a finding that, Respondent No. 4 had unauthorizedly

opened an account in the State Bank of India Hughes Road Branch, Mumbai and deposited the cheque dated 11.03.2010 which was liable to be

deposited in the usual account of the petitioner firm.

8. It is contended that, because the Ld. Additional Sessions Judge erred in law and in fact to appreciate that a bank account is, in the name of the

petitioner firm, at the State Bank of India, Hughes Road Branch, Mumbai was opened on 22.02.2010 and this was much prior to the cheque dated

11.03.2010 and the same points to a much larger conspiracy on the part of the respondent no. 2, 3 & 4 to usurp the entire business of the petitioner

firm.

9. Learned counsel appearing for Respondent No. 3 submits that, Respondent

No. 4Â Satyendrababu Saxena died during the pendency of the present

proceedings. Respondent No. 3 is wife of Respondent No. 4. Only allegations against Respondent No. 3 is that Respondent No. 4 transferred the

amount from the new account to the joint account of Respondent No. 3 and 4. It is submitted that no any overt act has been attributed to Respondent

No. 3 and therefore, Sessions Court has rightly allowed the revision filed by Respondent No. 3.

10. Learned counsel appearing for Respondent No. 2 submits that, Respondent No. 2 had no actual role in opening the Bank account and, he helped

merely to open the account to Respondent No. 4. Respondent No. 4 was working in the Managerial capacity in petitioner firm and therefore, under

bonafide impression and as a representative of the said firm Respondent No. 2 helped Respondent No. 4 in opening the account. It is submitted that

the said account was opened on temporary basis, subject to certain compliances and filing documents. However, there was no compliance of filing

necessary documents by Respondent No. 4, the said account was closed. It is submitted that, the Magistrate directed the investigation under sub

section (3) of Section 156 of Cr.P.C., and after investigation the concerned police officer filed 'B' summary. Therefore, it is submitted that there is no

substance in the allegations made against Respondent No. 2 by the complainant. Therefore, learned counsel appearing for Respondent No. 2 relying

upon the reasons assigned by the Sessions Court submit that, petition may be rejected.

11. Heard learned counsel appearing for parties at length, with their able assistance perused the pleadings and grounds taken in the petition and

annexures thereto, judgment of Sessions Court as well as the order passed by the learned Magistrate. It appears that the learned Magistrate directed

the investigation under Section 156 (3) of Cr.P.C., and filed report at ExhibitÂ5 and prepared â??Bâ? summary alleging that the complainant has filed

the false complaint. After receiving such â??Bâ? summary, the Magistrate heard the complainant and found that prima facie case is made out against

the accused thereby disclosing the alleged offences. It appears that, the Magistrate had gone through the police papers and observed that:Â?

â??In the investigation complaint G.V. Seetharam is the CEO and partner of complainant's partnershipÂ? firm namely Guma Tech. Marine Services at

Malad, whereas accused No. 1 was the General Manager of the partnershipÂfirm, division at Vasai and accused Nos. 2 and 3 are wife and

brotherÂinÂlaw of accused No. 1. It is further reveal when accountant Mr. Deepak Chevada verified the accounts of the partnershipÂfirm came

across payment received to partnershipÂfirm Rs. 50,000/Â came to be missing. PartnershipÂfirm accounts were reconciled and it reveals said

amount was credited in the account of State Bank of India, Huges Road Branch, Mumbai, where accused No. 3 was the officer. It further reveal in

investigation, accused no. 1 opened account in fictitious name â??Guma Tech Marine Services, Gala No. 71, Hastha Industrial Estate, Mahape, Navi

Mumbaiâ? being proprietor thereof. Account opening form indicates, said account was introduced by accused No. 3, though it was in fictitious name.

It further reveal later on accused No. 1 transferred said amount of Rs. 50,000/Â? in the joint account standing in the name of accused No. 2.â??

12. Learned Magistrate therefore, expressed the view that accused no. 1 is not proprietor of Guma Tech Marine Services, and opened bank account

to siphon complainants amount in that account. After considering statements of witnesses and documents on record, learned Magistrate found that

prima facie case is made out under Sections 406, 408, 420, 464, 467 of Indian Penal Code against all the accused, and observed that all the accused

played role while opening an account as well as transferring the fund in the joint account, and has taken cognizance under Section 190 (1) (b) of

Cr.Pc. And accordingly process was issued.

13. It appears that the Sessions Court after appreciating the documents/material and contentions of the complainant observed that, so far as

Respondent No. 3 is concerned who is wife of Respondent No. 4, there is absolutely nothing in the complaint to show prima facie case that she has

played any role in misappropriating the amount of Rs. 50,000/Â. This Court is of the opinion that said finding to the extent of Respondent No. 3 herein

appears to be inconsonance with the material placed on record and therefore, to the extent of Respondent no. 3 no interference is called for in the

impugned judgment and order passed by the Sessions Court. However, so far Respondent No. 2 is concerned, the Sessions Court wrongly and

contrary to material on record observed that the role of Respondent No. 2 is similar like Respondent no. 3, and also allowed the revision filed by

Respondent no. 2 herein. In fact, during the course of investigation the police have collected sufficient material indicating an involvement of

Respondent No. 2. The very allegation against Respondent No. 2 and 4 are serious and incriminating material was collected during the course of the

investigation, and also averments in the complaint make out a case against the Respondent No. 2 and 4. It appears from the material placed on record

that G.V.Seetharam is the CEO and partner in complainant partnershipÂfirm namely Guma Tech. Marine Services i.e. petitioner herein, whereas

accused no. 1 i.e. Respondent no. 4, herein was General Manager of partnershipÂfirm, division at Vasai and Accused no. 2 and 3 are wife and

brotherÂinÂlaw of Accused No. 1. It is transpired during the investigation that Accused no. 1 opened account in fictitious name i.e. â??Guma Tech.

Marine Services, Gala No. 71, Hastha Industrial Estate Mahape, Navi Mumbaiâ? being proprietor thereof. Account opening form indicates that said

account was introduced by accused no. 2, though it was in fictitious name. Therefore, role of Respondent No. 2 was active one and he helped in

opening the account in fictitious name. As already observed he is brother of Respondent No. 3 and brotherÂinÂlaw of Respondent No. 4. It prima

facie appears that, Respondent No. 2 who is brotherÂinÂlaw of Respondent No. 4, in collusion with Respondent No. 4 was instrumental in opening

the bank account in fictitious name. It appears that Respondent No. 2 facilitated and aided to open the said account, in absence of necessary

documents to support alleged date of establishment of new entity, new name of petitioner firm and proof of address of new entity. An also averments

in the complaint would clearly spell out prima facie active role of Respondent No. 2 in alleged commission of offence and therefore, order passed by

the learned Magistrate thereby issuing process qua Respondent No. 2 should not have been interfered with by the Sessions Court. Since Respondent

No. 4 died during the pendency of the present proceedings and there is no active role of Respondent No. 3 brought on record, the impugned order

passed by the Sessions Court qua Respondent No. 3 needs no interference. So far Respondent No. 2 is concerned there is incriminating material

brought on record during the course of police investigation and also averments in the complaint make out prima facie case against the Respondent No.

2 therefore, the order of issuance of process against Respondent No. 2 is justified. In that view of the matter, the petition is partly allowed. The

impugned judgment and order dated 27th April 2015 passed by Sessions Court to the extent of Respondent No. 3 stands confirmed, however, so far

Respondent No. 2 is concerned the judgment and order is quashed and set aside. The order passed by the Additional Chief Metropolitan Magistrate,

40th Court, Girgaon, Mumbai, qua Respondent No. 2 (Mr. Avdesh Kumar Ganesh Prasad Saxena) stands restored, said Court is directed to proceed

against said accused forthwith and dispose of the pending case within three months from today. The writ petition is partly allowed. Rule made absolute

to above extent. The writ petition stands disposed of accordingly, no order as to costs.

14. The Trial Court shall not get influenced by the observations made herein before during the course of trial and decide the pending proceedings in

accordance with law.

