

(1983) 06 BOM CK 0023

In the Bombay High Court

Case No : Criminal Writ Petition No. 75 of 1983

Gurumukhdas Seumal Nangrani

APPELLANT

Vs

Kantilal Lalji Chheda and Another

RESPONDENT

Date of Decision : 14-06-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 410, 451

Citation : (1983) 2 BomCR 406

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : M.R. Suryawanshi, P.P., N.L. Bhatt, for the Appellant; N.D. Shetty, for the Respondent

Judgement

Sharad Manohar, J.—This criminal writ petition is the offshoot of the criminal proceedings pending in the Court of the Metropolitan Magistrate Court No. 5 at Dadar, pursuant to the complaint filed by the present petitioner against respondent No. 1.

It is unnecessary to set out in details the grievance of the petitioner in his complaint. It is enough to state the nature of his complaint only to that extent to which it would be necessary to appreciate his grievance mouthed by the present writ petition.

2. The complaint has been filed by the petitioner against the accused contending that he had placed an order with respondent No. 1, who is a printer, for printing certain books which were to be published by the petitioner. For that purpose, certain printing materials were entrusted to respondent No. 1 (who will be referred hereafter as the accused). It is also his contention that certain amount belonging to the petitioner (who will be referred to hereafter as the complainant) was already lying with the accused. According to the complainant, therefore, there was a deposit of the said amount and of the said printing material with the accused. The accused was to print the material according to the order and the books were to be delivered to the complainant within the stipulated period. The

grievance of the complainant has been that the accused did not carry out the orders but, instead, purported to convert the printing material and the amount lying with him to his own use. The complaint was, therefore, filed by the complainant on 21st April, 1977 against the accused making grievance of the offence of criminal breach of trust u/s 406 of the Indian Penal Code.

The learned Magistrate ordered issuance of process. However, before framing the charge he perused the evidence that was sought to be produced by the complainant at that stage and not being satisfied about the complainant's contention he passed an order of discharge in favour of the accused. Against that order, a revision application was filed by the complainant to the Sessions Court and the Sessions Court set aside the order of discharge and sent back the matter to the learned Magistrate for decision according to law. Thereafter, the learned Magistrate framed charge against the accused and the trial proceeded thereafter.

3. Even before the order of discharge an application had been made by the complainant for seizure of the goods lying in the premises of the accused which goods were claimed by the complainant to be of his ownership. An order of seizure was accordingly passed by the learned Magistrate and certain goods, consisting of paper and other printing materials etc., were seized by the police. They were brought to the Court. The complainant thereafter made an application to the Court for return of the said goods to him, contending that the property in the said goods vested in himself. Upon this application, the learned magistrate passed the following order on 6-5-1977.

"The property attached under the Search Warrant and the property produced by the accused in the Court in this case will be returned to the complainant on his executing the bond for Rs. 10,000/-, undertaking to produce the property in the Court whenever directed. The complainant will not be allowed to take back the amount of Rs. 7,456/- deposited by him till further orders".

In pursuance of the said order, the complainant executed a bond on 15-7-1977 and upon execution of the bond, the following articles were given into the custody of the complainant :

1. 3 sealed packets containing articles from Serial Nos. 1 to 22 as per panchanama made by Sub-Inspector Gosavi of Bhoiwada Police Station.
 2. 12 bundles of papers wrapped in gunny cloth.
 3. 20 bundles of printed sheets tied in brown papers in gunny string.
 4. 6 bundles of colour papers wrapped in gunny cloth.
4. After the framing of the charge, the accused made an application to the Court directing the complainant to produce the goods which he had taken from the Court upon the execution of the bond. In pursuance of this application, the Court passed an order on 13-10-1981 directing the complainant to produce three sealed packets containing articles from Serial Nos. 1 to 22 as per the

panchanama made by Sub-Inspector Gosavi of Bhoiwada Police Station. He also directed the complainant to produce 12 bundles of papers wrapped in gunny cloth, 20 bundles of printed sheets tied in brown papers in gunny string and 6 bundles of colour papers wrapped in gunny cloth, out of which one bundle is loose, on or before 18-11-1981.

Against this order, a revision application was filed by the complainant to the Sessions Court. Various contentions, some of which were urged before me also, were urged before the learned Sessions Judge and it was contended that the order dated 13-10-1981 passed by the learned Magistrate was :

(a) without jurisdiction; and

(b) illegal or otherwise improper.

The learned Judge, however, was not impressed by any of the contentions urged before him and hence, he dismissed the complainant's revision application.

The present writ petition is filed against the said order of the Sessions Court dismissing the complainant's said revision application.

5. As mentioned earlier, various contentions were urged before the learned Sessions Judge with a view to question the validity of the learned Magistrate's order dated 13-10-1981. Out of these said arguments, the following arguments were urged before me by Mr. Bhatt, the learned Advocate for the petitioner/complainant.

His first contention was that the Court had no jurisdiction to order the complainant to produce the goods which were given in his custody because the bond executed by the complainant was not a legal one and hence he was under no liability to produce the goods before the Court. His second contention was that the goods which were given in his custody could not be identified because no identification mark was fixed upon them and hence it was impossible for the petitioner to produce the goods before the Court after a period of nearly four years. It was nextly contended that the order passed after such a lapse of time was from the very nature of things such as could not be carried out by the complainant. The contention was that the purpose of the order to return the paper to the complainant could not be anything other than that the same should be used by the complainant and, hence, it cannot be expected that the complainant can return that paper now at this stage after a lapse of nearly four years. Fourthly, it was contended that the production of the said goods was not at all necessary for the defence of the accused and hence the order was an unjustifiable order. The last and, in reality, the most important contention raised was that the complainant had made an application to the learned Magistrate for transfer of his case to some other Court because the complainant was not justified that he would get justice at the hands of that Court. Plea is that this was an oral application but no order was passed on the same. There is some confusion about the question as to whether in fact an oral application was made

in time before 13th October, 1981 and as to what was the date of the application. In the present petition it is stated that an oral application was made by the complainant to the Court on 20th August, 1981. In another application filed by him before the learned Chief Metropolitan Magistrate the date mentioned is 14th August, 1981. In the self-same application before the learned Chief Metropolitan Magistrate an averment is made to the effect that the application was moved on 13th October, 1981. The order passed by the learned Magistrate on 15th October, 1981 shows that the complainant did move an application for transfer of the case on 13th October, 1981 and that the Court did give him two weeks time to move the learned Chief Metropolitan Magistrate to pass an appropriate order on his application for transfer. Mr. Bhatt appearing before me on behalf of the complainant tried to salvage the position by standing that the application dated 14-8-1981 was an oral application whereas the application dated 13-10-1981 was a written application. He has, however, not cared to produce even a simple copy even of the said application before me.

6. To my mind, the prevarication practised by the petitioner/complainant thus betokens absence of a sense of responsibility on his part. But I do not feel it advisable to discuss anything in this behalf any further. Neither of the Advocates appearing before me was able to inform me about the exact date of the order of transfer passed by the learned Chief Metropolitan Magistrate, transferring the criminal proceedings instituted by the complainant from the 29th Court to the 5th Court. But from the very nature of things the order of transfer could not have been made earlier than 13-8-1981. In the application for transfer made to the Chief Metropolitan Magistrate, it is mentioned that an oral application was made by the plaintiff on 14-10-1981 for transfer of the case. It does appear from the impugned order of the learned Magistrate dated 13-10-1981 that an application was made also on that date and for the purpose of enabling the complainant to move the learned Chief Metropolitan Magistrate to pass appropriate order in that behalf. The Court in fact adjourned the hearing of the proceeding for a period of two weeks. On the basis of these facts, it is contended that an oral application must have been made before 13-10-1980, probably in August 1981 and if that was so, the impugned order dated 13-10-1981 passed after the application of transfer to the Court was without jurisdiction.

7. I must state at the very outset that the first two arguments advanced on behalf of the complainant are devoid of any substance. The argument that the bond executed by the complainant was not a legal bond, cannot be accepted even for a moment. The fact that he was ordered to execute a bond before taking into his custody the goods is not denied. The fact that he took the goods into his custody the goods is not denied. The further fact that before taking the goods into his custody, a document purporting to be a bond was executed by him is not disputed. Only a frivolous contention is raised before me that the document was not signed by the learned Magistrate and hence the document does not amount to a bond. I refuse to entertain such a frivolous plea in my writ jurisdiction.

Similar is the position about the contention that the goods could not be identified and that, hence, the bond is ineffective. The complainant is not an ignorant person, the bond is ineffective. He is an educated litigant and executed a bond with full awareness of the implications of the same. He solemnly assured the Court that he would produce the goods whenever called upon by the Court. He cannot now take up the plea that the goods were not identifiable. Moreover if there is any defect about the identification of the goods which the complainant produces as per the order of the Court, the Court will consider the question as to whether any mischief is being played by the complainant.

8. The third and the fourth contentions raised by the petitioner may be set out again :

The third contention is that the period of nearly four years had elapsed between the execution of the bond and the order of production; that the goods were given into the custody of the complainant so that the complainant should be saved of the loss; that from the very nature of things, in order to avoid the loss the printing material must have been used by the complainant for other purposes and, hence, it is humanly impossible for the complainant to produce the material after such a lapse of time.

The fourth contention is that the production of the said goods is really unnecessary for the defence case. The accused is not likely to be prejudiced in his defence if the goods are not produced by the complainant back in the Court as per the impugned order. The production causes unnecessary loss to the complainant with no corresponding benefit to the accused at all.

I do not propose to decide the correctness of these two arguments at this stage and I will mention the reason for the same after I have dealt with last contention urged on behalf of the accused.

9. The last and the most important contention urged on behalf of the complainant is that the application for transfer was made by the complainant to the learned Magistrate orally on or about 14th August, 1981. Mr. Bhatt stated to me that it may have been made either on 14th August or 20th August. He contends that the fact that he made an oral application on the 14th August is specifically referred to in his application for transfer made before the learned Chief Metropolitan Magistrate. This averment was not denied by the accused and as a matter of fact the order of transfer was obtained by the parties by consent from the learned Chief Metropolitan Magistrate. Mr. Bhatt contends that the application referred to by the learned Magistrate in his order of 13-10-1981 was the written application. The oral application was already made before him. The grievance is that inspite of this earlier oral application for transfer, the impugned order was passed by the learned Magistrate. The fact that the complainant's application for the transfer was a justified application is borne out by the subsequent event namely, that the learned Chief Metropolitan Magistrate has in fact passed an order, may be by consent, transferring the case from 29th Court

to the 5th Court. Contention, therefore, is that the impugned order dated 13-10-1981 passed by the learned Magistrate after the oral application but before the order of transfer is a nullity.

10. In support of this contention, Mr. Bhatt cited the following authorities :

(1) Pritam Singh and Another Vs. The State of Punjab, .

(2) Om Radha v. Emperor (1939)40 Cri L J 803.

(3) Richhpal and another v. State, 1954 Cri LJ 863 .

(4) Suresh Mohanlal Goradia Vs. Hiralal G. Thakkar and Others, .

I may state here that excepting the authority in the case of Om Radhe v. Emperor 1939(40) Cri L J 803, no other authority had even a remote application to the question urged before me. It is, therefore, wholly unnecessary for me to refer to any of them. However, the proposition urged by Mr. Bhatt does find some support from the judgment of the Sind Judicial Commissioner's Court in the case of Om Radhe v. Emperor 1939 Cri L J 803. This is what the learned Judge has observed in that case:

"Where a Magistrate is doubtful whether a person applying for stay of proceedings u/s 526(8) is or is not a party within the meaning of that sub-section, the safe course for him is to grant an adjournment of the case because if he refuses the adjournment and it is afterwards found that such person is party within the meaning of section 526(8), all proceedings from the date of refusal would be illegal".

I am not sure that the facts of the present case justify invoking the ratio of the said case. Further, I do not even want to go to the extent of stating, as a proposition of law in every case, that where application for transfer is made and the application is refused, all the subsequent orders of the Magistrate become void merely because the superior Court subsequently grants the application for transfer. This would be particularly so in the case such as the present one where the order for transfer was not passed on merits but by consent of the parties.

11. All the same, I am of the opinion that the instant case does appear to be one where the learned Magistrate would have been better advised not to pass the impugned order when he was himself inclined to give two week's time to enable the complainant to move the Chief Metropolitan Magistrate for an order of transfer. The fact that an oral application was made on 14-8-1981 by the complainant for transfer of the case from that Court to some other Court cannot be lightly brushed aside by me. The allegation in that behalf is specifically made in the application for transfer made before the learned Chief Metropolitan Magistrate. No argument was advanced before me that this averment was denied by the accused in the proceedings for transfer pending before the learned Chief Metropolitan Magistrate. This gives some credence to the contention that in fact an oral application was made by the complainant on 14th August, 1981 or at any

rate, some time in the month of August 1981, that is to say, some time before 13-10-1981. It is true that it would have been desirable for the complainant to make a written application immediately after the rejection of the oral application. But the fact that he did move an application on 13-10-1981 is on record because the impugned order itself refers to the said application.

12. I do not for a moment suggest that the fact that an application for transfer was made by the complainant to the learned Magistrate in any way weighed upon him while passing the impugned order; but it is a well settled principle of law that it is not enough that justice is really done. In the interest of sound administration of justice, it is necessary that justice should also appear to have been done. If an application was made before the learned Magistrate for transfer and of this was the repetition of the earlier oral application, nothing would have been lost if the learned Magistrate had postponed the passing of the impugned order dated 13-10-1981. The anomalous position, thus, is that the impugned order has been passed by the learned Magistrate, 29th Court but the implementation of the order is to be made by the transferee Court. It is true that quite often such situation does arise and it cannot be avoided. But the present case is one where it could be easily avoided. If the petitioner was given time to move the learned Chief Metropolitan Magistrate for appropriate order of transfer and if no order for transfer was passed, the impugned order could have been passed by the learned Magistrate after the period of adjournment was over. If, on the other hand, the application for transfer was granted by the learned Chief Metropolitan Magistrate, as it happened in the present case, there would be no possibility for the learned Magistrate to pass the impugned order.

It is on this short ground that I am inclined to accept the petitioner's contention in the present petition to a limited extent.

13. I, therefore, propose to set aside the impugned order dated 13-10-1981 passed by the learned Magistrate, 29th Court. This does not, however, mean that the impugned order suffers from any merits. If so advised, it would be open for the accused to make the same or similar application to the transferee Court. If such an application is made, it will be open for the complainant to urge his grounds for opposing the application. Contentions Nos. 3 and 4 referred to above can be urged by him before the learned Magistrate and if those or any other contentions were urged by way of opposition to the application, they will be considered by the learned Magistrate on their own merits. This is the reason why I have expressed no opinion above in the said contentions.

The Rule earlier issued is, therefore, partly made absolute. The impugned order passed by the learned Magistrate dated 13-10-1981 is set aside. The parties are at liberty to make appropriate application and to raise appropriate contentions in support of them or in opposition to them in the trial Court.