(1978) 12 BOM CK 0008

In the Bombay High Court

Case No : Criminal Application No. 717 of 1978

S. Sukmini Achi and Others APPELLANT

Vs

Bankimchandra K. Lodaya and Another RESPONDENT

Date of Decision : 15-12-1978

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 181(4)
Penal Code, 1860 (IPC) — Section 114, 120B, 14, 407

Citation : (1978) 12 BOM CK 0008

Hon'ble Judges : V.S. Kotwal, J;V.S. Deshpande, J

Bench : Division Bench

Advocate : B.A. Desai, S.M. Shah and S.I. Shah, for the Appellant; P.P. Hudlikar, Public Prosecutor, V.H. Gumaste and V.G. Madbhavi for respondent No. 1 and K.V. Trivedi, for respondent No. 2, (original accused No. 1), for the Respondent

Judgement

V.S. Deshpande, J.—This application under Article 227 of the Constitution is directed against the process issued by the Metropolitan Magistrate, Second Court, Mazgaon, Bombay, in Criminal Case No. 106/S/1977. Petitioners pray for quashing of the criminal proceedings initiated one the complaint of respondent No. 1 in March, 1976.

2. The complainant lodged this complaint for offences u/s 407 read with section 120-B or in the alternative section 407 read with section 114 of the Indian Penal Code. Complainant is the Manager of the firm Govindji Jevat & Co. Accused No. 1 is the Manager of M/s. Deluxe Roadlines. This firm carries on transport business. Accused Nos. 2 & 3 are the Directors of M/s. Rukmini Mills Ltd., situated at Silaiman (Madurai District of Tamil Nadu). Accused No. 4 is the Office Assistant of the said Mills whereas accused No. 5 is the General Manager. Complaint''s case is that Rukmini Mills Ltd. agreed to purchase 50 bales of MCU-5 New Cotton at the rate of Rs. 4,700/- per candy of 784 lbs. F.O.R. Silaiman. 90% of the price was to be paid by the purchasers on arrival of the goods at the destination. The 90% amount was to be paid in the Bank by honouring the hundi drawn by the sellers and the balance was to be paid within 80 days after passing weighment. The

goods, according to the complainant, were despatched from Guntur in terms of the complainant''s letter dated 8-1-1976. The letter contemplated delivery of the consignment to or to the order of the consignee bank whose name was also mentioned in the lorry receipt issued by the transporters Delux Roadlines.

3. The goods were despatched on 9-1-1976 from Guntur under the lorry receipt bearing No. 4220 dated 9-1-1976. The said lorry receipt together with the hundi for Rs. 1,00,000/- drawn on Rukmini Mills Ltd. and insurance cover note and perform a invoice was sent to the India Bank under letter dated 10-1-1976. The hundi was however, not honoured, nor the goods were returned as was contemplated in terms of the instructions by the complainant to the accused No. 1. Para 11 of the complaint itself indicates that the complainant on inquiries learnt that accused No. 1 and accused Nos. 2 to 5 hatched a conspiracy and pursuant to the said conspiracy accused No. 1 issued another transport receipt bearing No. 27077 dated 9-1-1976 showing the complainant''s company as a consignor and self Silaiman as a consignee and the lorry driver was directed to deliver the goods to accused Nos. 2 to 5 without consignee copy. The lorry driver accordingly delivered the goods to accused Nos. 2 to 5 without consignee copy to accused Nos. 2 to 5. It is then averred that accused Nos. 2 to 5 admitted the receipt of the goods without making any payment and without obtaining an order, endorsement or letter of authority from the consignee Bank. They further requested Shri Rohit Khona of the complainant for weighment and passing of the goods and told him that they were sorry for such conduct and will pay the amount immediately. It is then alleged that accused Nos. 2 to 5 assured the complainant that they will not consume or convert the goods to their own use without paying the price. In view of these assurance, a fresh invoice bearing No. 1 dated 29th/30th January, 1976 for a sum of Rs. 1,08,443.08 was issued to the said Mills. It is then alleged that inspite of this assurance the accused dishonestly converted the said goods to their own use in violation of the said contract without paying the price of the goods.

4. It appears that the learned Magistrate rather than taking cognizance of the complaint, directed the police to held an inquiry u/s 200 of the Code of Criminal Procedure. Exhaustive inquiry was accordingly made by the Sub-Inspector of Police, Pydhonie Police Station after contacting the agents of the complainant in Guntur and Madurai as also the Proprietor of the Transport Company in Bombay and the complainant himself. The Inspector submitted his report on 26th May, 1976. According to this report, the dispute in between the complainant and the accused was of a civil nature though the statements made by accused No. 1 were found to be suspicious. The Inspector also reported, that offence, even if any, cannot on the averments made in the complaint, and facts investigated be said to have been committed within the State of Bombay.

5. Notwithstanding this report, the learned Magistrate took cognizance and issued process against the accused, validity of which is challenged in the present application by accused Nos. 2 to 5.

6. Mr. Desai, the learned Counsel appearing for the petitioner, contends that the averments made in the complaint are not clear as to whether conversion of the goods by getting prepared the lorry receipt No. 4220 of 9-1-1976 is claimed to be an offence or breach of the assurances and representations alleged to have been made by accused Nos. 2 to 5 on 29th and 30th January, 1976 is considered to be the offence committed by accused Nos. 2 to 5. This contention of Mr. Desai appears to us to be well founded. In our opinion, Mr. Desai''s other two contentions, viz., that no part of the offence can he said to have been committed within the jurisdiction of Maharashtra and that the averments do not make out a case of a any offence, are well founded.

7. It is not in dispute that goods were loaded at Guntur and not in Bombay, it is also not in dispute that goods were delivered by the driver of accused No. 1 to accused Nos. 2 to 5, according to the complainant, at Silaiman in Madurai District. The complaint gives an impression as if the lorry receipt bearing No. 27077 dated 9-1-1976 was prepared by accused No. 1 by committing some offence. Mr. Gumaste, the learned Counsel appearing for respondent No. 1, could not indicate how accused No. 1 can he said to have committed any such offence when goods were loaded by the representatives of the complainant themselves on the truck at Guntur as indicated in the said lorry receipt No. 27077 and when invoice was enclosed along with this receipt and a letter Ex. G by the representatives of the complainant at Guntur. Lorry receipt No. 27077, the authenticity of which is challenged itself if prepared admittedly at Guntur. For the purpose of the first point, it is enough to notice that no part of the entrustment can be said to have taken place at Bombay, i.e., within any part of the Maharashtra State. It is, therefore, difficult to see how the offence can be said to have been committed in any part of the Maharashtra State.

8. Mr. Gumaste relied on sub-section (4) of section 181 of the Code of Criminal Procedure and contended that , in terms of the instructions given by the complainant to accused No. 1, the transporter-accused No. 1 was liable to return the goods to the complainant in Bombay in the event of non payment of the price thereof by not honouring the Hundi and not producing consignee''s lorry receipt duly endorsed by the Bank in their favour by the purchasers-accused Nos. 2 to 5. According to Mr. Gumaste, accused No, 1 had no authority to deliver the goods to accused Nos. 2 to 5 without the consignee Bank''s endorsement to that effect on the consignee''s copy of the lorry receipt which could have been secured by accused Nos. 2 to 5 only by honouring hundi and making payment to the Bank. For this Mr. Gumaste relies on the complainant''s letter dated 8-1-1976 and the lorry receipt No. 4220 issued by accused No. 1. The said letter does contemplate return of the goods on such non-payment. It is this obligation to return goods and accused No. 1''s failure to so return, according to Mr. Gumaste, that gives rise to the "accountability " of accused No. 1. Accused Nos. 2 to 5 are claimed to be so accountable because of the abetment of accused No. 1. Firstly, this assumes that, instructions in letter dated 8-1-1976 continued to subsist inspite of what was done by complainant''s agent at Guntur. Secondly, it also assumes

as if a accountability for the goods and the price is the same for the purposes of section 181(4). We have already indicated how the goods were entrusted to accused No. 1 at Guntur by the representatives of the complainant themselves. Both the representatives have made a statement to the police that they had entrusted the goods against lorry receipt No. 27077 to accused No. 1 authorising him deliver the goods to accused Nos. 2 to 5 on receipt of the transport charges only. In fact letter to that effect Exhibit ''G'' clearly indicates the factual situation to be so. Complaint does not suggest that representatives of the complainant at Guntur were in any manner in conspiracy with any of the accused. In fact Mr. Gumaste was not in a position to challenge the authority of these representative of the complainant at Guntur. Plain implication of this Act on the part of the representatives of the complainant would be to cancel whatever contrary instructions were given by the complainant to accused No. 1 in Bombay on 8-1-1976. In this view of the matter, accountability of accused No. 1 in respect of the goods about which offence is alleged to have been committed does not arise.

9. Mr. Gumaste, however, contends that submitted accused Nos. 2 to 5 have not paid the price of the goods. They are guilty of converting the goods to their use without payments of the money. Accused Nos. 2 to 5 are, according to Mr. Gumaste, guilty u/s 407 of the Indian Penal Code. Mr. Gumaste, therefore, contends that accused Nos. 2 to 5 are accountable to the complainant in Bombay for the price of the goods so appropriated and converted by them without payment of the price. Now, accountability for the unpaid price of the goods retained is one thing and accountability about the property in respect of which the offence is alleged to have been committed is another thing. Accountability for the price of the goods alleged to have been misappropriated or converted is not the ingredient of the offence u/s 407 of the Indian Penal Code. The words " required to be accounted for by the accused person " in sub-section (4) of section 18 of the Code could have reference only to the accountability contemplated by any section of the Indian Penal Code or any other section of which any infraction is alleged and not any other accountability such as the accountability of the price of any such goods which is not ingredient of the offence. Looked at from this point of view, accountability, as a result of the civil liability, for the unpaid price of the goods retained, can have no relevance whatsoever for attracting the provisions of section 181(4) of the Code. Looked at from this point of view, there is no averment in the complaint to invoke the jurisdiction of any Magistrate in Bombay. The complaint is liable to be quashed on this ground itself.

10. Even on merits also Mr. Desai''s contention appears to be well founded. We have already indicated how the allegation as to the goods loaded at Guntur having been delivered to accused Nos. 2 to 5 at Silaiman by allegedly unauthorised lorry receipt No. 27077 is unfounded. The Investigating Officers have examined the complainant''s agents at Guntur who have expressly admitted to have loaded the goods on the truck at Guntur under the said lorry receipt under express instructions from their Bombay Office. The question of accused

No. 1 thus having committed any offence in pursuance of an unauthorised lorry receipt No. 27077 in that case can never arise. It is true that accused No. 1 also appears to have issued another lorry receipt No. 4220 on that very day at Bombay. The receipt no doubt purports to be for the goods loaded at Guntur. The complaint does not indicate the circumstances under which lorry receipt could have been issued in Bombay when the goods were contemplated to be loaded at Guntur. In fact truck number mentioned in lorry receipt No. 4220 does not happen to be the same truck number in which the goods have actually been despatched from Guntur to Silaiman. Lorry receipt No. 27077 does make reference to the correct lorry number. Whatever be circumstances as to the issue of receipt No. 4220, goods under no circumstances can be said to have been loaded on the truck under the said receipt and no inference can be drawn against accused No. 1 in respect of the said receipt. Mr. Desai appears to be right in contending that the complainant has suppressed the relevant facts and circumstances as to the issue of lorry receipt No. 4220.

11. Statements of the agents of the complainant recorded at Madurai also indicate that they delivered the goods to accused Nos. 2 to 5 in terms of letter Exhibit ''G'' and the oral instruction given by the complainant''s agents at Guntur. Complainant''s agents at Madurai also have stated before the police that the goods were weighed by them even without receipt of the price thereof under instructions from their Bombay Office.

12. In these circumstances it is difficult to see how accused Nos. 1 to 5 can be said to have conspired to commit the offence of criminal breach of trust u/s 407 of the Indian Penal Code. It is true that accused do not appear to have paid the price of the goods inspite of assurances. But then, mere failure to pay the price of the goods or breach of the such assurances cannot amount to an offence u/s 407 of the Indian Penal Code. Mr. Gumaste drew our attention to the terms of letter Exhibit ''F'' dated 31st December, 1975. That is the letter issued by the brokers of the complainant at Madurai Mahalaxmi Agencies to the accused indicating the terms on which the 50 bales of cotton were agreed to be sold to the complainant by accused. Accused do not admit to have accepted the terms of this letter. The letter contemplates payment of 90 per cent of the price before the delivery is accepted by the accused. On the other hand, subsequent letter issued by the complainant''s agents at Guntur at Exhibit ''G'' contemplates payment by the accused only to the extent of freight charges of the truck. Both the terms are simply irreconcilable. Implication is that terms of letter dated 31-12-1975 never come into existence at all. Police report significantly makes mention of the silence of the complainant on the point as to what role the brokers Mahalaxmi Agencies have played in this transaction. Mr. Gumaste, therefore, is not entitled to rely on the recitals in this agreement Exhibit ''F'' indicating as if the accused would be the trustees of the goods till the price thereof is paid by them. The averments in the complaint read with the report of the police and the enclosed statements indicate that no offence as such has been committed by the accused and that the dispute between them is essentially of a Civil nature. The process as

well as the proceedings initiated on the complaint are liable to be quashed.

13. Rule is accordingly made absolute and the criminal proceedings are hereby quashed.

