(2013) 01 BOM CK 0024

In the Bombay High Court

Case No : Criminal Appeal No. 416 of 1999

Shri. Joseph Kurian APPELLANT

Vs

Nandkishor Laxinarayan Agarwal and Others RESPONDENT

Date of Decision : 28-01-2013

Acts Referred:

Citation : (2013) ALLMR(Cri) 3575 : (2014) 3 BomCR(Cri) 707

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : D.V. Tele, APP for State, for the Appellant; H.H. Padalkar, Advocate for the Respondent Nos. 1, 3, 4, 7, 8, 10 and 11, Mr. S.S. Jadhavar, Advocate for the Respondent No. 2 and Mr. B.R. Kedar, Advocate for the Respondent No. 9, for the Respondent

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and order of R.C.C. No. 11/1998, which was pending in the Court of Judicial Magistrate, First Class, Railway, Aurangabad. The respondents are acquitted of the offence punishable u/s 3(A) of Railway Property (Unlawful possession) Act, 1966. Both the sides are heard. This Court has perused the original papers.

2. In short, the facts leading to the institution of the appeal, can be stated as follows:-

Complainant Kurian was working as Inspector in Railway Police Force (R.P.F.). On 6.6.1997 he received information against Rajuri Steel Plant, Jalna. There was information that in the premises of steel plant, there was stolen property of railway like pieces of rail. Under search warrant, Kurian took the search of premises in presence of the witnesses and his staff members. Accused No. 1 was present in the premises when the search was taken and he told that he was the Director of the company and also responsible for day to day affairs of the company.

3. During search, Kurian recovered 77 pieces of rail which came to be described

as R. 90 - 64 pieces and 52 k.g. rails - 13 pieces. As per the formula of Railway Department, Kurian calculated the weight of these pieces and the weight was approximately 11.5 Metric tones. Accused No. 1 could not produce any document to show about possession in respect of these pieces and so the pieces came to be seized under the panchanama. Statement of accused No. 1 came to be recorded. Accused No. 1 promised to show the relevant record subsequently.

4. On 8.6.1997 accused No. 1 produced record like three gate passes showing that his brother, accused No. 8, had purchased scrap from Parbhani Railway Yard and in respect of this scrap, three gate passes were issued to Vijay Ispat, concern of accused No. 8. The gate passes were dated 2.6.1997 and 3.6.1997. Thus, explanation was given that this property was collected as a scrap from Parbhani Railway Yard.

5. The investigation revealed that huge quantity of rail pieces of rail were lifted illegally from the campus of Parbhani Railway Yard by accused No. 1 with the help of staff of railway like accused Nos. 6, 7, 9 and other persons. Accused No. 6 was working as the custodian of the property. Accused No. 7 was incharge of security and accused No. 9 was working in Account Department of the railway. It transpired that accused No. 2 was present in the campus of the railway yard on 2nd and 3rd June as representative of accused No. 1 for collecting the scrap. Accused No. 3 is owner of Truck No. MTB-7848, accused No. 4 is owner of truck No. MRL-555 and accused No. 5 was also present in the campus of Railway Yard as representative of accused No. 1. Accused No. 8 was present as representative of Vijay Ispat when the scrap was collected.

6. The investigation revealed that two different kinds of modus operandi were used. Excess quantity of pieces of rail were loaded in trucks as against gate passes. When there was no gate pass in respect of truck bearing No. MRL-555, pieces of rail were loaded in this truck and these pieces were virtually stolen and taken away. This way the pieces of rail scrap were lifted on 2.6.1997 and 3.6.1997. It transpired that around 54 M.T. pieces of rail were lifted and taken away by using aforesaid modus operandi. Out of that, goods weighing 11.5 M.T. were seized on 6.6.1997. It was informed that around 23 M.T. steel was used for manufacturing purpose in Rajuri Steel Plant. Accused No. 1 gave the amount of Rs. two lakhs as the price of the steel, weighing 23 M.T. This amount was also taken over under panchanama.

7. During investigation a Builty book of Saibaba Transport Company was taken over to show that 5 trucks of this company were used by the accused for taking the goods away from the Railway Yard. Some octroi record from Municipal Council was collected in respect of 5 trucks to show that goods like pieces of rail were brought within octroi limits of Jalna by using trucks. Statements of some staff members of Railway Yard came to be recorded to show that they were present when the goods were loaded in 5 trucks. Statements of owners of some truck and drivers of truck came to be recorded. Statements of even accused came to be recorded. Survey of the remaining goods from railway yard was

made and the report in that regard was prepared. This was done to ascertain the quantity which was stolen or illegally taken away from the Railway Yard. After completion of investigation Kurian filed a complaint for aforesaid offences.

8. The charge was framed for aforesaid offences. In all 38 witnesses were examined. The Trial Court has acquitted the accused by holding that the identity of the material is not established and it is not proved that the property seized from the campus of Rajuri Steel Company was railway property as defined under the Railway Property Act.

9. For the accused, reliance was placed on the case reported as Kashmiri Lal Vs. The State of Uttar Pradesh, . The Apex Court has made following observations in this case:-

3. Before any one can charged with the offence u/s 3, it must be shown that he was in possession of railway stores which by the definition of section does not include all articles which are the property of a railway administration but only those which are used or intended to be used in the construction, operation or maintenance of a railway. Mere unlawful possession of the property of any railway administration is not an offence. The prosecution must also prove that the articles were being actually used or were intended to be used for by the railway. Thus any article which is the property of a railway administration but which has been discarded or rejected for further use would be outside the definition of railway stores. Railway stores may be new or old and an offence may be committed in respect of stores of either kind. If the railway administration has no further use of them, be they new or old as in the case where they have become unserviceable or outmoded, no person can be charged with an offence u/s 3 in respect thereof. It is only when the articles satisfy the definition of railway stores that the prosecution can be successfully launched against a person in unlawful possession thereof. Even in such a case the prosecution must first adduce evidence to show that there was cause for reasonable suspicion of the stores being stolen or obtained unlawfully. It is only when the burden in respect of this is discharged by the prosecution that the onus shifts to the accused to account satisfactorily of his possession of the same. He may, for instance, show that he had purchased the property in open market where goods of this kind are usually sold or that he had bought them from someone bona fide in the belief that the vendor had lawfully obtained the same.

The prosecution side placed reliance on some reported cases and made submission that in addition to recovery of goods, there are statements of accused and other persons which were recorded by Officers of Railway Police Force and in view of the evidence of aforesaid witnesses, conviction is possible against all the accused. The cases cited are reported as Ganesh Chaudhary Vs. State, , Maghar Singh Vs. State of Punjab, , Balukishan A. Devidaval Vs. The State of Maharashtra, and Ranjit Singh Vs. The State of Madhya Pradesh, . The High Courts have discussed the provisions of Railway Protection Force Act and also Railway Property (Unlawful Possession) Act. It is observed that the Railway

Protection Force Officers are not Police Officers within meaning of section 25 of Evidence Act and so, the statements made before them, which may be confessional, are not hit by section 25. The Apex Court has discussed the importance of extra judicial confession in the case cited supra. In first case, Allahabad High Court has discussed section 3 of Railway Property (Unlawful Possession) Act and it is observed that inference as to the ownership of the property can be drawn from the circumstances attending thereto. There cannot be dispute over the propositions made in these reported cases. It needs to be kept in mind that some explanation is offered by accused Nos. 1 and 8 with regard to material weighing 11.5 M.T. which came to be recovered and seized from the campus of Rajuri Steel Plant and there is record in respect of the explanation. In view of these circumstances, it was necessary for prosecution side to establish that the property which was recovered was stolen from railway yard.

10. The undisputed record like receipt dated 15.5.1997 issued in favour of Vijay Ispat by Railway Department shows that rail pieces weighing 34.20 M.T. were purchased as scrap by Vijay Ispat. Along with the receipt, there is description of the rail pieces, which were to be sold and the description is as follows:-

Pieces of aforesaid description form one group.

(i) 60 R. - 23 numbers.

(ii) CA:-7 - 13 numbers.

(iii) CB-7 - 10 numbers.

Pieces of aforesaid description form second group.

(i) 52 k.g. - 254 numbers.

(ii) 90 R. - 152 numbers.

(iii) 50 CB - 151 numbers.

(iv) 60 R - 124 numbers.

(v) 82 LB - 99 numbers and

(vi) 81 LB - 156 numbers.

Pieces from aforesaid description form last group.

11. As against the aforesaid description, all the pieces, which were purchased as a scrap, the recovered pieces are described in panchanama as R. 90 - 64 pieces and 52 k.g. - 13 pieces.

12. If the allegations that excess quantity was loaded and even when there was no gate pass in respect of truck No. MRL-555, goods were loaded in the truck are ignored, it can be said that there was explanation with Rajuri Steel Plant that the aforesaid seized pieces were purchased as scrap in the name of Vijay Ispat and

that is why, they were present in the campus of Rajuri Steel Plant.

13. In view of the aforesaid circumstances, the burden was heavy on the prosecution to prove that excess quantity of pieces of rail were actually loaded in the truck, Truck No. MRL-555 was loaded with goods even when there was no gate pass and by using different modus operandi, theft of some pieces of rail was made in the campus of Railway Yard, Parbhani.

14. The prosecution has tried to use some record like the receipts prepared by Mathura Weigh Bridge in respect of three trucks bearing No. MWY-4722, MWN-2590 and MRB-2088. It is the case of the prosecution that in the first truck 7 M.T., in the second truck 6.5 M.T. and in the third truck 2.5 M.T. pieces of rail were loaded in excess and that way, the theft was committed. To prove this circumstance, evidence is given in respect of gate passes Exh. 91, 92 and 93, the owner of transport company Sopan (PW 4) is examined. One Dalai (PW 38) is examined to prove the receipts prepared by Mathura Weigh Bridge and Tukaram (PW 3) Octroi Officer is examined to show that octroi in respect of 5 trucks was paid. Evidence of Tukaram, however, shows that octroi was paid in respect of one truck on 2.6.1997 and octroi in respect of one truck was paid on 3.4.1997 and octroi in respect of three trucks was paid on 4.6.1997. He has tried to say that approximately weight of scrap was 58 M.T. and the charges were paid. The receipt is at Exh. 42. It appears that he has no personal knowledge with regard to the issuing of the receipts. Even if it is presumed that the goods weighing 58 M.T. were present in the five trucks, the same goods which were taken out from the Railway Yard were there, cannot be inferred. Sopan (PW 4), the owner of transport company, has no personal knowledge about the incident and his evidence is to the effect that he had supplied five trucks to the accused No. 1. The gate passes show that rail pieces having description of 90 R., 59 R., 82 LB were loaded under the three gate passes and the truck numbers were MWY-4722, MWN-2590 and MTV-2088. The total weight of all the goods mentioned in three gate passes is 8.504 M.T. The aforesaid evidence and the other substantive evidence given by R.P.F. Officers cannot explain as to what happened with the remaining quantity which was purchased under the railway receipt by accused No. 8 and the weight of which was 34.6 M.T. Thus, the record of gate passes is not sufficient to prove that only this material was allowed to be lifted under the sale receipt of scrap.

15. There is one more circumstance which is not supporting the prosecution case. Evidence is given in respect of Joint Survey Report dated 7.7.1997. The report has two parts. In the first part, the description of the material as per the stock is given and in the second part, the description of material which was actually found is given. The first part consists of following material:-

(i) 52 kg - 14.2 M.T.

(ii) 60 R. - 2.94 M.T.

(iii) 50 R. ? 7.2 M.T.

(iv) 90 R. - 6.32 M.T.

The part second consist of following material actually found in the yard:-

(i) 52 kg - 17.1 M.T.

(ii) 60 R. - 2 M.T.

(iii) 50 R. - 7.4 M.T.

(iv) 90 R. - 6.39 M.T.

The aforesaid description of the material shows that excess quantity of pieces of rail having description of 52 kg was found in the yard. Similarly, the quantity of 90 R. was not found less. Thus, the Survey Report is not consistent with the case of prosecution that some pieces were stolen or illegally removed from the Railway Yard.

16. Kurian (PW 5) and Shaileshkumar (PW 1), R.P.F. Officers, have given evidence on the search conducted by them and the panchanama, which is at Exh. 48. Even if the evidence on actual seizure is accepted as it is, in view of the aforesaid circumstances inference cannot be drawn that the material seized by them on that day was stolen property.

17. One Officer Dudhyal (PW 2) is examined to prove some panchanamas on identification. Some witnesses are examined who identified the accused who were present in the Railway Yard when the scrap material was lifted. Some witnesses are examined, but they have turned hostile. In view of these circumstances, there is no need to discuss the panchanama in respect of identification and the evidence of Dudhyal (PW 2) in respect of all the witnesses like PW 14 to PW 17, PW 19, PW 21, PW 25, PW 26, PW 30 to 37, who have turned hostile. There is no need to discuss their evidence or the statements recorded by R.P.F. Officers in view of the aforesaid circumstances. There is some evidence of witness like Kadir (PW 22) on the panchanama of seizure of trucks which was done subsequent to the aforesaid seizure. There is no need to discuss that evidence also. Some evidence is given by examining Sales Tax Officer and Excise Officer to show that accused Nos. 1 and 8 are looking after the day to day affairs of Rajuri Steel Company and Vijay Ispat This fact is not disputed. There are other Directors also and so no more discussion on this point is required. A panch witness PW 18 is examined to prove the panchanama of seizure of Rs. 2 lakhs produced by accused No. 2. In view of the aforesaid circumstances, there is no need to discuss that evidence also. The aforesaid two R.P.F. Officers have given vital admissions that there were no identification marks to say that that pieces belong to Railway. Even if it is presumed that the description like 90 R., 52 kg, given in panchanama and by the witnesses is sufficient to prove that property was manufactured for the use of railway, in view of other evidence that it was scrap and scrap was sold by Railway Yard, not much importance can be given to this description also. Thus, the prosecution failed to prove that the property seized was belonging to railway. When the prosecution is not able to

prove that the property found in possession of person like accused No. 1 was belonging to railway, the offence u/s 3(A) cannot be proved. The Apex Court has made observations in this regard in the case already cited. Thus, the interference is not possible in the decision given by the trial Court and the appeal stands dismissed.

