

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.6153 OF 2019

Mandira
SalgaonkarDigitally signed by
Mandira Salgaonkar
Date: 2021.03.21
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1. Ankit Pravin Gupta	}	
Age about 36 years, Occ. Director	}	
Indian Inhabitant of Maharashtra	}	
Residing at Flat No.2201, Vision Crest	}	
Building, D.S.Babrekar Marg, Near	}	
Catering Clg, Prabhadevi, Bhavani Shankar	}	
Mumbai 400 028	}	
	}	
2. Manju Pravin Gupta	}	
Occ. Director	}	
Indian Inhabitant of Maharashtra	}	
Residing at Flat No.2201, Vision Crest	}	
Building, D.S.Babrekar Marg, Near	}	
Catering Clg, Prabhadevi, Bhavani Shankar	}	
Mumbai 400 028	}	Petitioners

Versus

1. The State of Maharashtra	}	
At the instance of Raanjangaon Police Station,	}	
Pune	}	
	}	
2. Zamil Steel Building India Pvt. Ltd.	}	
Through its authorized representative	}	
Mr.Alkesh Roy, having office at	}	
Plot No.B-32/2, Ranjangaon MIDC,	}	
Dhonksangvi, Tal. Shirur, Dist. Pune	}	Respondents

Mr.Durgesh Jaiswal a/w Mr.Pradeep Jain i/b
Mr.Mukesh G. Gupta for the Petitioners.

Mr.Tapan Thatte a/w Mr.Shantanu Adkar for the
Respondent No.2.

Mr.VB.Konde-Deshmukh, APP for the
Respondent/ State.

M.M.Salgaonkar

**CORAM : S.S.SHINDE &
MANISH PITALE, JJ.**

**RESERVED ON : 11th JANUARY, 2021.
PRONOUNCED ON : 20th JANUARY, 2021**

JUDGMENT (PER MANISH PITALE, J.)

1. Rule. Rule made returnable forthwith, with the consent of the parties, heard finally.

2. By this writ petition, the petitioners are seeking quashing of FIR bearing No.158 of 2018 dated 5th September, 2018 registered at police station Ranjangaon, District Pune for the alleged offences under Sections 406 and 420 read with 34 of the Indian Penal Code (**hereinafter referred to as “IPC”**). During the pendency of the writ petition, as the charge-sheet was filed, writ petition was amended and the petitioners now seek quashing of the charge-sheet dated 5th March, 2020 filed in pursuance of the aforesaid FIR.

3. The complainant (Respondent No.2) was added as a party to the present writ petition by way of amendment and, therefore, the learned counsel appearing for the petitioners as well as the learned counsel appearing for respondent No.2 (Original Complainant) and the learned APP appearing for respondent No.1/State were heard for final disposal of the present writ petition.

4. The facts leading to filing of the present writ petition are that the petitioners are directors of a company, which is in the business of

transportation. It is an admitted position that the respondent No.2 had engaged the services of the petitioners' company and that they had entered into an agreement dated 13th February, 2017. As per the said agreement, the company of the petitioners was required to transport the goods of respondent No.2, for which charges were to be paid. It is the case of the petitioners themselves that they decided to retain certain goods handed over by respondent No.2 for transport and deliver to a consignee, on the basis that respondent No.2 had failed to make payments for earlier such services of transportation provided by the company of the petitioners as per the aforesaid agreement. The petitioners claimed that an amount of Rs.42,95,632/- was due from respondent No.2 and that the said respondent had failed to make the payment of the said amount despite repeated reminders. The petitioners claimed that they were well within their rights to retain the goods handed over by respondent No.2 for transportation till such time as respondent No.2 paid the amount allegedly due from it. There was exchange of communications between the rival parties in respect of the said claim of the petitioners. The documents on record also show that respondent No.2 encashed the bank guarantee during the process of the said communications.

5. It is also undisputed that some time in April 2018, respondent No.2 filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (**hereinafter referred to as "Act of 1996"**) seeking certain interim directions from the District Court at Pune, in view of the fact that clause 31 of the said agreement dated 13th February, 2017, provided for resolution of dispute by arbitration.

6. The record also shows that prior to filing of the aforesaid application under Section 9 of the Act of 1996, exchange of communications between the parties included legal notices and reply notices issued by the parties to each other concerning Section 15 of the Carriage by Road Act, 2007 (**hereinafter referred to as “Act of 2007”**). It is in this backdrop that the said FIR dated 5th September, 2018 was registered against the petitioners on a complaint submitted by respondent No.2 before police. According to respondent No.2, the act of the petitioners in failing to deliver goods as promised to the consignee and retaining the same amounted to criminal breach of trust and cheating. As noted above, in pursuance of the investigation undertaken by the police, charge-sheet dated 5th March, 2020, came to be filed against the petitioners.

7. Mr.Durgesh Jaiswal, learned counsel appearing for the petitioners, submitted that the dispute between the parties in the present case was purely of a civil nature and that respondent No.2 was deliberately trying to give it the colour of a criminal offence, which ought not to be permitted by this Court, in the light of the settled position of law. According to the learned counsel for the petitioners, the admitted facts in the present case do not indicate the presence of ingredients of either offence under Section 406 for criminal breach of trust or offence of cheating under Section 420 of IPC. It is further submitted that the act of the petitioners in retaining the goods handed over by respondent No.2 on the ground of failure of the said respondent to make payments, was in consonance with the right available to a common carrier like the company of the petitioners under Section 15 of the Act of 2007. It

was submitted that when the statutory right was available to the respondent No.2 and the dispute itself was civil in nature, registration of FIR and filing of charge-sheet was not justified in the present case and that therefore, the present petition deserved to be allowed.

8. On the other hand, Mr.Tapan Thatte, learned counsel appearing for respondent No.2 i.e. the original complainant, vehemently submitted that merely because there was an arbitration clause in the aforesaid agreement dated 13th February, 2017 and that arbitration proceedings were initiated, would not *ipso facto* lead to a finding that criminal proceedings were not maintainable. It was submitted that the manner in which the petitioners had acted in the present case demonstrated that all the necessary ingredients for offences under Sections 406 and 420 read with 34 of IPC were made out and that therefore, registration of FIR and filing of the charge-sheet were justified. The learned counsel for respondent No.2 invited attention of this Court to Section 15 of the Act of 2007 to contend that the same did not apply in the facts of the present case at all. It was submitted that the right under the said provision would accrue in favour of the petitioners only if the consignee failed to take delivery of the goods. It is submitted that even as per the contentions of the petitioners, there was nothing to show that the consignee in the present case had either refused or failed to take delivery of the goods. Therefore, it was submitted that reliance on the aforesaid provision was wholly misplaced and that the writ petition deserved to be dismissed.

9. Mr.V.B.Konde-Deshmukh, learned APP appearing on behalf of the respondent No.1/State, would support filing of charge-sheet against the petitioners in the present case.

10. Heard the learned counsel for the rival parties and perused the material on record. There can be no doubt about the fact that there is indeed an arbitration clause in the agreement dated 13th February, 2007, executed between the rival parties. It is also an admitted position that arbitration proceeding has been initiated and that prior to the same, an application under Section 9 of the Act of 1996, was indeed filed before the competent court. The petitioners have placed much reliance on Section 15 of the Act of 2007, to further claim that there is a statutory right available to them and that the action taken on their behalf while exercising such a right could never lead to criminal liability. The question therefore, that arises for consideration is, as to whether in the facts and circumstances of the present case, criminal proceedings could have been initiated against the petitioners and as to what is the protection of statutory right available to the petitioners under Section 15 of the Act of 2007.

11. In order to appreciate the contentions raised by the rival parties, it would be appropriate to refer to the said provision. Section 15 of the Act of 2007 reads as follows :

“15. Right of common carrier in case of consignee’s default.”-(1) If the consignee fails to take delivery of any consignment of goods within a period of thirty days from the date of notice given by the commoner carrier, such consignment may be deemed as unclaimed :

Provided that in case of perishable consignment, the period of thirty days shall not apply and the consignment shall be deemed unclaimed after a period of twenty-four hours of service of notice or any lesser period as may be mutually agreed to by and between the common carrier and the consignor.

(2) In the case of an unclaimed consignment under sub-section (1), the common carrier may,-

(a) if such consignment is perishable in nature, have the right to sell the consignment; or

(b) if such consignment is not perishable in nature, cause a notice to be served upon the consignee or upon the consignor, if the consignee is not available, requiring him to remove the goods within a period of fifteen days from the date of receipt of the notice and in case of failure to comply with the notice, the common carrier shall have the right to sell such consignment without any further notice to the consignee or the consignor, as the case may be.

(3) The common carrier shall, out of the sale proceeds received under sub-section (2), retain a sum equal to the freight, storage and other charges due including expenses incurred for the sale, and the surplus, if any, from such sale proceeds shall be returned to the consignee or the consignor, as the case may be.

(4) Unless otherwise agreed upon between the common carrier and consignor, the common carrier shall be entitled to detain or dispose off the consignment in part or full to recover his dues in the event of the consignee failing to make payment of the freight and other charges payable to the common carrier at the time of taking delivery.”

A bare perusal of the above quoted provision would show that for a common carrier like the company of the petitioners to claim a right, the first requirement is a default on the part of the consignee. In other words, the right would accrue to a common carrier upon failure of the consignee to take delivery of any consignment of goods. It is only upon such failure on part of the consignee that a common carrier would be entitled to issue a notice calling upon the consignee or the consignor (in this case respondent No.2) requiring either of them to remove the goods and only in case of failure to do

so in a stipulated period of time, the common carrier would have the right to sell such consignment.

12. In the present case, there is not an iota of material to show that the consignee had either refused to or failed to take delivery of the consigned goods. Therefore, in absence of the basic requirement as specified in the said provision, in the facts of the present case, it cannot be said that a right accrued in favour of the petitioners' company as a common carrier to invoke Section 15 of the Act of 2007. Reliance placed on behalf of the petitioners on the judgment of the Hon'ble Supreme Court in case of *Transport Corporation of India Vs. M/S. Veljan Hydrair Ltd.*¹ is also misplaced because the said case was specifically concerned with Section 10 of the Act of 2007 and only a passing observation was made that a common carrier would be entitled to dispose of the consigned goods for realising its payment. But, even in such a passing observation, it was specifically stated that the common carrier would do so, if such a right was available. In the facts of the present case, there is no question of invoking Section 15 of the Act of 2007 and hence, the contentions raised on behalf of the petitioners by relying upon the said ruling cannot be accepted.

13. The next limb of arguments addressed on behalf of the petitioners concerns initiation of criminal proceedings when the dispute between the parties was purely of civil nature. Much emphasis was placed on the fact there was an arbitration clause in the agreement dated 13th February, 2017, between the rival parties. It is also an admitted position that the arbitration proceedings have

¹ 2007(3) SCC 142

been initiated. But, merely because there is an arbitration clause and an arbitration proceeding has been initiated, which is pending, it cannot be said that the criminal proceedings cannot be initiated against the petitioners. What is crucial in such circumstances is, as to whether the facts narrated in the complaint lodged with the police discloses the ingredients of the alleged offences. In the present case, offences have been registered against the petitioners under Section 406 of IPC pertaining to criminal breach of trust and Section 420 of IPC pertaining to cheating.

14. A perusal of Section 405 of IPC, which defines 'criminal breach of trust' shows that the ingredients of the offence are that, when a person has been entrusted with property and such person dishonestly misappropriates or converts such property to his own use, the offence is said to have been committed. In fact, illustration (f) specifically states that when a carrier is entrusted with property to be carried by land or by water and such carrier, dishonestly misappropriates the property, the offence of criminal breach of trust, stands committed.

15. In the present case, as noted above, statutory right under Section 15 of the Act of 2007 is clearly not made out by the petitioners in their averments. The basis on which, the petitioners claim that they were justified in retaining the goods entrusted by respondent No.2 for transportation and delivery to the consignee, is their belief that they were entitled to retain the goods for the reason that respondent No.2 allegedly owed them money towards service of such carrier provided by the petitioners. There is nothing in the agreement between the parties that if there were arrears due from

respondent No.2, the petitioners would be entitled to retain the goods. There is nothing to show that the petitioners have made any attempt to deliver the goods to the consignee, but the consignee refused to accept delivery of the same. There is also nothing to show that the petitioners were, in any manner, entitled to retain the goods for alleged arrears payable by respondent No.2. The petitioners could very well have refused to transport the said goods on the ground that unless respondent No.2 made good payment of alleged arrears, service of transportation would not be provided.

16. In this situation, *prima facie*, the ingredients of the offence of criminal breach of trust appear to be present in the instant case. Similarly, the ingredients of offence of cheating can also be said to be *prima facie* made out in the present case for the reason that the petitioners seem to have induced respondent No.2 to hand over the said goods for the ostensible reason for transporting and delivering the goods to the consignee, knowing fully well that they did not intend to do so and they intended to retain the goods in view of the alleged arrears of respondent No.2.

17. Therefore, we are of the opinion that no case for quashing of charge-sheet is made out in the facts and circumstances of the present case. The petitioners have erred in relying upon Section 15 of the Act of 2007 and they have not been able to make out any case for holding that the dispute in the present case can be said to be purely of civil nature.

18. In view of the above, we find that there is no merits in the present writ petition and, accordingly, it is dismissed.

(MANISH PITALE, J.)

(S.S.SHINDE, J.)