
Samar Nath Vs State of Gujarat and Another

Criminal Miscellaneous Application No. 12172 of 2009

Court: Gujarat High Court

Date of Decision: Aug. 27, 2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 202#Negotiable Instruments Act, 1881 (NI) â€” Section 138#Penal Code, 1860 (IPC) â€” Section 114, 34, 405, 406, 407#Sales of Goods Act, 1930 â€” Section 47, 50

Hon'ble Judges: Akil Kureshi, J

Bench: Single Bench

Advocate: Paurami B. Sheth and Manav A. Mehta, for the Appellant; M.L. Shah, APP for Respondent 1 and Pravin Gondaliya, for Respondent 2, for the Respondent

Judgement

Akil Kureshi, J.

The petitioner is the original accused. He seeks quashing of criminal case No. 1182/2009 (here-in-after referred to as "the said complaint") pending before the learned JMFC, Sanand.

2. Briefly stated facts are as follows:

2.1 Petitioner is the original accused No. 1 in said complaint lodged by respondent No. 2 herein. Briefly stated allegations in the complaint are that

respondent No. 2 is a manufacturer of cotton products. It sells goods mostly through exports. One of the customers of the complainant is one

America based company called Mervyns L.L.C. (here-in-after referred to as "the purchaser company"). The purchaser company places purchase

order with the complainant company. As per the purchase order complainant company entrusts transport of such export consignment to APL

Logistics (India) Pvt. Ltd. at Mumbai. It may be noted that the petitioner is Managing Director of said APL Logistics (India) Pvt. Ltd. Such

consignment is transported to its destination in USA by APL Logistics (India) Pvt. Ltd. through the vessels of Orient Overseas Container Line

(India) Pvt. Ltd. ("OOCL" for short) of which original accused No. 2 is stated to be the Managing Director. It is stated in the complaint that for

such transport work, the complainant pays the charges to the accused. Accused was responsible for safe transport of the goods. Accused had to

carry out instructions of the complainant company till the goods could be handed over to the purchaser company. In June-July 2008, purchaser

company placed large purchase order with the complaint company details of which are given in the complaint. Complainant company handed over

the consignment to the accused which loaded in the ship for transport. At that point of time the complainant company came to know that purchaser

company has gone bankrupt. They had also filed for bankruptcy according to American law. Complainant company thereupon instructed the

accused not to deliver the goods to the purchaser company. Such instructions were duly received by the accused. In fact they were informed that if

such instructions are ignored they would be directly liable for such actions. The accused ignored such instructions though they were duty bound to

carry out instructions of the complainant company. Even when the goods were on high sea, such instructions were given despite which goods

which were entrusted to the accused, were handed over to the purchaser company. It is thus the allegation of the complainant that accused

committed offence punishable u/s 407 read with Sections 34 and 114 of the IPC for the goods which are valued at approximately Rs. 94,63,424/-

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2.2 On the said complaint, learned Magistrate recorded the statement of the complainant and on 28.1.2009 ordered police investigation u/s 202 of

the Code of Criminal Procedure. Upon presentation of the report by the police, learned Magistrate by his order dated 4.7.2009 directed

registration of the complaint and ordered issuance of summons. Petitioner therefore, challenges the complaint and order of Magistrate upon such

complaint.

2.3 Case of the petitioner broadly is that APL Logistics (India) Pvt. Ltd. is not the agent of complainant company. It was receiving goods on behalf

of the purchaser company. Payment for transportation was being made by the purchaser company. Its liability was limited and that too was to the

purchaser company. At the time when the instructions were given by the complainant company, the goods were already in possession of OOCL. It

is also the case of the petitioner that APL Logistics does not come within the definition of term "Carrier". It is therefore, the case of the petitioner

that in absence of any entrustment, offence of criminal breach of trust that too by carrier is not made out. Case of the complainant emerging from

the complaint as well as from the affidavits and documents produced on record is that APL Logistics (India) Pvt. Ltd. were entrusted a

consignment for transport; that later on clear instructions were given not to deliver the goods to the purchaser company. The complainant even

agreed to pay demurrages. Despite such instructions accused parted with the possession of goods in favour of the purchaser company. They

therefore, committed above- mentioned offences.

3. Appearing for the petitioner, learned senior Counsel Shri Mihir Thakore with Shri Manav Mehta contended that:

1) The date on which the instructions were given by the complainant company, goods were not in custody of APL Logistics (India) Pvt. Ltd. but

were handed over to OOCL.

2) Complaint is filed against the present petitioner No. 1 Samarnath who is employee of APL Logistics (India) Pvt. Ltd. In any case he is not liable

for any criminal acts.

3) APL Logistics (India) Pvt. Ltd. was acting as agent of the purchaser. By the complainant company therefore, there was no entrustment of goods

to APL Logistics (India) Pvt. Ltd. Offence punishable u/s 407 of IPC is therefore, not made out.

4) In support of his contentions, he relied on the following decisions:

1) The State of Gujarat Vs. Jaswantlal Nathalal, wherein the Apex Court observed as under:

8. The term ""entrusted"" found in Section 405 IPC governs not only the words ""with the property"" immediately following it but also the words ""or

with any dominion over the property"" occurring thereafter - see Velji Raghavji Patel Vs. State of Maharashtra, Before there can be any

entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted

by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an

entrustment need conform to all the technicalities of the law of trustsee Jaswantrao Manilal Akhaney v. State of Bombay. The expression

"entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another,

continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a

fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the government had sold the cement

in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not

make the transaction in question anything other than a sale. After delivery of the cement, the government had neither any right nor dominion over it.

If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been

prosecuted for the same. But we are unable to hold that there was any breach of trust.

2) Keki Hormusji Gharda and Others Vs. Mehervan Rustom Irani and Another, wherein the Apex Court observed that IPC does not, except in

some matters, create vicarious liability. Office bearers like Directors of a limited company are therefore, not personally liable for commission of an

offence under the IPC.

3) Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, wherein also the question of vicarious liability of Director of a Company came up

for consideration.

4) S.K. Alagh Vs. State of U.P. and Others, wherein the Apex Court made following observations:

20. As admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have

committed an offence u/s 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically

therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable

for any offence committed by the company itself. See Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya,

4. On the other hand, learned Senior Counsel Shri Kavina for the complainant contended that goods were within the custody and domain of APL

Logistics (India) Pvt. Ltd when instructions were given not to deliver possession thereof to the purchaser company. He took me through

correspondence between the parties to demonstrate that complainant company had in fact agreed to bear cost of demurrages etc. for the said

purpose upon which APL Logistics (India) Pvt. Ltd. had also agreed at one point of time to withhold the delivery. He invited my attention to

Section 47 of the Sale of Goods Act, 1930 which pertains to seller's lien. He also referred to Section 50 which provides that when the buyer of

goods becomes insolvent, the unpaid seller who has parted with possession of the goods has the right of stopping them in transit and to retain them

until payment or tender of the price.

5. Having heard learned advocates for the parties and having perused the documents on record, I find that in the complaint, complainant has made

allegations about goods being handed over to the purchaser company despite instructions to the contrary from the complainant. However, nowhere

in the complaint, the complainant has alleged what role did the present petitioner play except for stating that present petitioner who is shown as

accused No. 1 is the Managing Director of APL Logistics (India) Pvt. Ltd. and is responsible for day to day functioning and that he is responsible

for transactions described in the complaint. There are no allegations made individually against the present petitioner. Though in the complaint

general allegations are made against both the accused including the present petitioner, such allegations need to be viewed in light of

correspondence between the parties which is produced on record. All the correspondence mainly through e-mail is with representative of the APL

Logistics (India) Pvt. Ltd. and not the present petitioner. As already noted, case of the complainant is that APL Logistics (India) Pvt. Ltd. was

entrusted with the task of transporting consignment from Mumbai to USA. While the goods were in transit, complainant came to know that buyer

company has gone bankrupt. Instructions were therefore, issued to APL Logistics (India) Pvt. Ltd. to withhold the delivery of consignment.

Despite such clear instructions, goods were delivered to the purchaser company. Nowhere the complaint suggests that there was any direct dealing

with accused No. 1 i.e. the present petitioner. Nowhere complaint suggests that instructions were given to him personally and that the said accused

had committed breach of trust and thus committed offence u/s 407 of IPC.

6. In view of this, present petitioner cannot be held liable for any offence u/s 407 of IPC. Counsel for the complainant feebly contended that

petitioner is shown to be the Managing Director of APL Logistics (India) Pvt. Ltd. and was responsible for its day to day functioning. However, in

absence of any allegations against the petitioner of his own acts or omission amounting to criminal offence and in absence of any statutory provision

creating any vicarious liability, he cannot be hauled up for alleged offence. His position of Managing Director and being responsible for day to day

functioning of the company may be relevant for offence such as one punishable u/s 138 of the Negotiable Instruments Act where statutorily

vicarious liability is caste on certain persons responsible for functioning of the company. In the present case, question of such vicarious liability does

not arise.

7. In addition to the above conclusions that I have reached, I have also perused the documents on record. Though it is the case of the complainant

that APL Logistics (India) Pvt. Ltd. was its agent and was being paid by the complainant company, there are no documents to support either of the

two statements. On the contrary, there is sufficient evidence to suggest that APL Logistics (India) Pvt. Ltd. was acting as agent of the purchaser

company. In Forwarder Cargo Receipt, following condition has been incorporated:

3. APLL undertakes to receive the Goods on behalf of the Customer, hold the same as an agent and deliver or forward them to carriers or

transporters in accordance with the instructions of the customer. If at any time the method and/or route of forwarding selected by the Customer

shall become impossible to perform for any reason, APLL may use any other method available at its discretion and all charges and/or expenses

incurred in using such method shall be for the Customer's account.

8. In another receipt, between APL Logistics (India) Pvt. Ltd. and purchaser company also following condition is to be found :

APL LOGISTICS HONGKONG LTD ("APLL") HEREBY ACKNOWLEDGES RECEIPT OF THE PACKAGES OTHER SHIPPING UNITS SAID TO CONTAIN THE GOODS ABOVE ("THE GOODS") IN APPARENT EXTERIOR GOOD ORDER AND CONDITION UNLESS OTHERWISE STATED. THE SELLER, BUYER AND ALL OTHERS HAVING AN INTEREST IN THE GOODS ("THE CARGO OWNERS") ARE ADVISED AND BY DELIVERING GOODS AND ACCEPTING THIS RECEIPT AGREE, THAT THE RECEIPT, CUSTODY, CONSOLIDATION AND FORWARDING OF THE GOODS BY APLL ARE SUBJECT TO ALL THE TERMS AND CONDITIONS SET FOR ON THE REVERSE SIDE OF THIS FORWARDERS CARGO RECEIPT AND INCORPORATED BY

REFERENCE ON THIS SIDE AND HEREOF. THE NUMBER ON THIS FORWARDERS CARGO RECEIPT MAY BE WRITTEN, STAMPED, OR PRINTED.

9. Many such receipts are on record.

10. This condition is to be found in all cargo receipts. It thus becomes clear that the APL Logistics (India) Pvt. Ltd. was acting as transporter of

the purchaser company and not the seller company i.e. the complainant. It appears that transportation charges have also been paid by the

purchaser company. Complainant company has not produced any record to suggest that such charges were borne by them. Under the

circumstances, I find that APL Logistics (India) Pvt. Ltd. was under no legal obligation to withhold the delivery of the goods at the instance of the

complainant company. It is true that there was lengthy correspondence between the representative of the complainant company and APL Logistics

(India) Pvt. Ltd. As pointed out by counsel for the complainant company on 23.7.2008 through e-mail it was conveyed by the complainant

company that container should not be delivered to the consignee or his agent till further instructions. In response to the mail, one Bhavna Patel from

APL Logistics (India) Pvt. Ltd. wrote back suggesting that "we will check the same with the carrier if there are possibility on the same as the

containers are almost reached the destination." Further mail was sent stating:

Kindly advise who will pay the reshipment charge as the cargo is almost reaching the destination as their would be other charges involve too.

Would require an undertaking letter from your end which should shows the reason as well as all the decision are been taken from your end and all

the charge will be borne by the vendor and you will be responsible on any circumstance as this was your decision to get back the container for

which APPL wont be responsible on same.

After receiving the letter from your end as well as the confirmation will be able to proceed further if no reply this would be delay on which we wont

be responsible.

11. In response to this the complainant company conveyed that:

Please do not handover these containers until you get a written confirmation from undersigned, the reason for these instruction is that some

discussions are going on on commercial points between Modern Terry Towels Limited - Mervyns LLC USA- and Lifung.

We hereby confirm that Modern Terry Towel will bear the expenses what so ever it may, in case of need.

Just to reinstate "DO NOT HAND OVER THESE CONTAINERS TO CONSIGNEE OR HIS AGENT OR ANY OTHER PERSON, TILL

YOU GET INSTRUCTION FROM UNDERSIGNED IN WIRTING." If handover then APPL will be held responsible.

The undertaking as required is attached and original will be delivered./couriered to your office. Mean while please do the need full in the matter.

12. Again on behalf of APL Logistics (India) Pvt. Ltd., it was stated as under :

Please note that as per your below mail where in you have written to us to hold the containers we request you to please send a letter including the

below points

1. We here by indemnify APL Logistics from any claim arising out of holding the below containers and take the complete responsibility of getting

the cargo back.

2. All related cost and consequences arising out of getting the containers back would be borne by the shipper "Modern Terry towels".

3. All charges related to holding the container at the destination also would be borne by the shipper "Modern Terry towels".

We have approached the carrier to stop the containers and are also checking if we can re direct the consignment back to Mumbai. We would come

back to you once the same is confirmed to us by the carrier.

13. Complainant company wrote back suggesting:

Please make it clear that presently we are asking you to do not hand these containers until you get a written confirmation from undersigned only.

Since some discussions are going on on commercial points between Modern Terry Towels Limited-Mervyns LLC. USA - and Lifung.

The further instruction will be given to you in due course.

We have already given the undertaking to bear the expenses what so ever, it may, in case of need for holding the containers at destination

Please confirm the understanding.

14. Final reply received from APL Logistics (India) Pvt. Ltd. was:

Pls note have added the ID's for the carrier OOCL whom you need to contact directly for holding the containers at the destination, kindly co-

ordinate with them on same and pls issue the same letter to the carrier on holding the container to proceed further.

15. Complainant had thereupon sent following message:

Since the shipment was sent through you only, how OOCL will entertain us directly hence you have to coordinate this issue with OOCL.

16. Reply to that from APL Logistics (India) Pvt. Ltd. was:

Since we are not a party to the seaway bill of lading issued in your favour being a factory load container, the carrier will have to entertain you

request, thus address the letter sent to us - directly to them.

16. There are subsequent messages along similar lines. Above correspondences may suggest that at one point of time APL Logistics (India) Pvt.

Ltd. was sympathetic to the request of the complainant company not to hand over the containers to the purchaser company and subsequently

changed its position. However, this is neither here nor there. It had no legal obligation to withhold the delivery. To my mind the complainant

company once had handed over the consignment to the APL Logistics (India) Pvt. Ltd., who were acting as agent of the purchaser company, lost

its control over such goods. It could not legally require the APL Logistics (India) Pvt. Ltd. to stop delivery thereof. APL Logistics (India) Pvt. Ltd.

in any case were acting as agents of purchaser company.

17. Section 47 and 50 of the Sale of Goods Act only give certain civil rights to the APL Logistics (India) Pvt. Ltd. under certain circumstances.

The same however, cannot be ground for creating criminal liability of the APL Logistics (India) Pvt. Ltd. or its employee for offence of breach of

trust.

18. In view of the above discussion, I do not find that even otherwise any offence against the petitioner is disclosed. Section 407 of IPC provides

for punishment for offence of criminal breach of trust by a carrier. Term "Criminal breach of trust" has been defined in section 405 of IPC in

following manner:

405. Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly

misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law

prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge

of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust."

19. It is therefore, important that property should have been entrusted to the accused for offence of criminal of breach of trust. In the present case,

as already held APL Logistics (India) Pvt. Ltd. was agent of the purchaser company. Its possession of goods cannot be termed as entrustment by

the complainant company. No offence of criminal breach of trust is therefore, made out. Question of such offence being committed by carrier

therefore, would not arise.

20. In view of the above, it is not necessary to decide whether APL Logistics (India) Pvt. Ltd. were in possession of the goods or whether OOCL

were in possession of the goods at the time when instructions for not handing over custody to the purchaser were issued by the complainant.

21. In the result, I find that no offence u/s 407 of IPC is disclosed against the petitioner. Complaint therefore is required to be quashed qua the

petitioner.

22. Accordingly, criminal case No. 1182/2009 pending before the learned JMFC, Sanand is quashed qua the petitioner. Petition is allowed and

disposed of accordingly.