

(1985) 11 BOM CK 0022

Bombay High Court

Case No: Criminal Application No. 1025 of 1984

Ubaidulla Abdul Aziz Farid

APPELLANT

Vs

Sharafuddin Abdul Fakihi and
Others

RESPONDENT

Date of Decision: Nov. 7, 1985

Acts Referred:

- Penal Code, 1860 (IPC) - Section 405, 415, 420

Citation: (1986) 3 BomCR 207

Hon'ble Judges: R.R. Jahagirdar, J

Bench: Single Bench

Advocate: S.R. Chitnis, for the Appellant; V.S. Jadhav, Public Prosecutor, V.V. Kamat, for the Respondent

Judgement

R. Jahagirdar, J.

The petitioner hereinafter will be referred to as the accused No. 1 and the 1st respondent will be referred to as the complainant. Accused Nos. 1, 2 and 3 are being prosecuted in the Court of the learned Judicial Magistrate, First Class, Bhiwandi in Criminal Case No. 434 of 1981 on the complaint filed by the complainant for the offences punishable u/s 406 and 420 r/w section 34 of the Indian Penal Code. The case of the complainant as disclosed in the complaint is as follows:

In 1974, the complainant was working as an Agent of the Bombay Mercantile Co-operative Bank of Bhiwandi Branch and as such was looking after the work of disbursing the loans and advances to the members of the said bank. Accused Nos. 1, 2 and 3 are members of the Bank. Accused No. 1 applied for the overdraft facilities to the extent of Rs. 10,000/- against the hypothecation of his 20 buffaloes and offered accused Nos. 2 and 3 as his sureties. On the hypothecation of 20 buffaloes, the overdraft facilities to the extent of Rs. 10,000/- was ordered with monthly instalment of Rs. 835/- within a period of 12 months. As many as four documents

were executed in favour of the bank. The first is joint promissory note dated 20th June, 1974 executed jointly by all three accused persons promising to repay the sum of Rs. 10,000/- jointly and severally to the bank. The 2nd document is an undertaking by accused No. 1 in favour of the bank to repay all the amounts and creating a lien on all the securities kept and hypothecated to the complainant-bank. The third document is an agreement of hypothecation of 20 buffaloes executed by accused No. 1 in favour of the bank dated 20th June, 1974, stating that accused No. 1 shall keep all the 20 buffaloes with him and in case of default the complainant bank had an authority to take possession of the said buffaloes and redeem the amount of advance then due to the bank by selling the said buffaloes. The last document executed in favour of the bank, is guarantee by accused nos. 2 and 3 guaranteeing repayment of the advances to the extent of Rs. 10,000/- plus agreed interest to the complainant bank. All the four documents have been annexed by the complainant to the complaint which has been filed in the Court of the Chief Judicial Magistrate, First Class at Bhiwandi in Criminal Case No. 434 of 1981. According to the complainant, the accused did make certain payments and thereafter accused No. 1 failed and neglected to pay the balance amount of advance. Therefore, the bank issued several notices to all the accused calling upon them to repay the advanced amount to the Bank. Since no repayment of the loan was forthcoming, on 19th of May, 1981, the Bank had issued final notice to the accused and demanded from them a sum of Rs. 9557.10 which was then found due on that day at the foot of the account of accused No. 1 with the said Bank.

It is further the case of the complainant that he learnt from reliable source that accused No. 1 had removed 20 buffaloes from the address as mentioned and having verified personally the same, stated in the said notice that the accused No. 1 had committed breach of loan agreement and was liable for criminal action. The complainant, therefore, filed the complaint alleging that accused No. 1 had no intention to repay the amount taken by him and he had removed 20 buffaloes hypothecated by him to the Bank without the consent of the bank and in spite of the diligent search made by the complainant, the whereabouts of the said buffaloes are not known to the complainant. Accused Nos. 2 and 3 did not prevent accused No. 1 from removing the said buffaloes. Hence, according to the complainant, offence of cheating and criminal misappropriation was committed by the accused. The learned Magistrate issued the process against all the accused. Being aggrieved by the order of issue of the process the accused No. 1 had filed the present criminal application.

2. Mr. Chitnis, the learned advocate for the accused No. 1, who is the petitioner before me has urged that on the reading of the complaint and the documents which have been referred to by the complainant an offence of cheating and criminal misappropriation as alleged by the complainant in his complaint has not been made out. The learned Magistrate was, therefore, in error in issuing the process against the accused No. 1.

3. Mr. Kamat, the learned advocate for the complainant on the other hand has urged before me that on the day of the agreement dated 20th June, 1974, accused No. 1 had executed hypothecation agreement under which 20 buffaloes belonging to the accused were kept as security. It was urged that under the agreement and particularly Clause 3 of the hypothecation agreement, accused No. 1 had agreed that without the previous consent of the Bank accused No. 1 would not sell or dispose of the 20 buffaloes. Relying upon this representation, which representation was believed, to be true, the complainant-bank was induced to give to accused No. 1 the overdraft facility to the extent of Rs. 10,000/-. Mr. Kamat for the complainant contended that in violation and in breach of the Clause 3 of the Hypothecation agreement, accused No. 1 had disposed of 20 buffaloes, without the consent of the bank authorities. It was urged that by selling 20 buffaloes without the consent of the bank and in violation of the Clause 3 of the hypothecation agreement, accused No. 1 has caused wrongful gain to himself and wrongful loss to the Bank. But for the representation made by accused No. 1 the complainant Bank would not have given the overdraft facilities to the extent of Rs. 10,000/-. In this connection, the learned advocate for the complainant has invited my attention to paragraph 6 of the complaint, wherein it has been clearly averred that accused No. 1 has cheated the complainant-bank and has dishonestly induced the complainant-Bank to part with the sum of Rs. 10,000/- as advance to him and with an intention not to repay the said advance amount. He also invited my attention to the verification made by the complainant wherein also the complainant has made averment that the complainant-bank has been cheated by accused No. 1, who is the petitioner before me. Thus, it was submitted that on the fair reading of the plaint as also the hypothecation agreement and the verification, the case of cheating is clearly made out against the accused No. 1. This submission of Mr. Kamat does not find favour with me and has to be rejected for the following reasons. On 20th of June, 1974, when overdraft facility to the extent of Rs. 10,000/- was given to the accused No. 1 by the complainant-bank, security of 20 buffaloes as evidenced by the hypothecation agreement, was very much in existence. It is an admitted position that accused No. 1 has paid monthly instalment for some months, which position emerges from the recitals of the complaint itself. It is not the case of the complainant that security of 20 buffaloes which was offered by accused No. 1 on 20th of June, 1974, when overdraft facility to the extent of Rs. 10,000/- was given to accused No. 1 was not in existence. In my opinion, intention of cheating has to be ascertained not with regard to the events which have taken place subsequent to 20th of June, 1974, but material date would be the date on which the overdraft facilities were given by the complainant-bank to the accused No. 1 i.e. 20th of June, 1974. In this connection, a decision in the case of [State of Kerala Vs. A. Pareed Pillai and Another](#), may be referred to. In this case, firm "A" carried on business of selling coconut oil. It had an account with the bank "F" and was allowed overdraft facilities to the extent of Rs. 50,000/- and discounting facilities to the extent of Rs. 50,000/- the firm having furnished sufficient securities to the satisfaction of the bank

authorities for these facilities. Accused P and K-1 on behalf of the firm entered into a conspiracy with K-2 and resorted to the device of obtaining railway receipts without actually delivering oil tins for booking. In pursuance of the conspiracy 13 such bogus railway receipts were obtained and 13 demand drafts and later 13 bogus railway receipts in support of the drafts were deposited with the Bank. There was a practice in vogue according to which the bank used to accept demand drafts before depositing railway receipts. The bank was able to realise the amount of two drafts from the consignee firm. The amounts of remaining demand drafts could not be realised and the credit entries of these were reversed in the bank in the accounts of the firm. It was contended in the said cases that P and K-1 made false representation in respect of the booking tins of coconut oil and thereby induced the bank to act to their detriment and were thereby guilty u/s 420 of the Indian Penal Code. It was held that there was no cogent evidence to show that the accused did not have the intention to fulfil their promise to supply coconut oil tins at the time of making representation. The offence of cheating against the accused was not proved. It was not shown that the intention of the accused was to cheat at the time of making the promise which is an essential ingredient to prove the offence of cheating. Such an intention cannot also be inferred from the fact that the accused could not subsequently fulfil the promise. Thus, the test that has to be applied in the present case is whether on 20th of June, 1974, when the complainant bank gave overdraft facilities to accused No. 1 to the extent Rs. 10,000/- against hypothecation agreement executed by accused No. 1 in favour of the complainant-bank regarding his 20 buffaloes, there was any intention on the part of the accused No. 1 to cheat the bank. As clearly stated in the complaint itself, the security of 20 buffaloes was in existence not only on the date of transaction viz. 20th June, 1974, but continued for some years. It is only some days prior to the 17-6-1981 on enquiries the bank learnt that accused No. 1 had disposed of 20 buffaloes. In paragraph 3 of the complaint it is clearly stated that accused No. 1 initially made certain payments to the complainant bank, but thereafter, he failed and neglected to repay the balance of amount advanced to him. Illustration "C" to section 415 of the Indian Penal Code in my opinion, does not support the case of Mr. Kamat for the complainant that the complaint discloses the offence of cheating against accused No. 1. For these reasons, the submission of Mr. Kamat for the complainant that the averments made in the complaint disclose offence of cheating cannot be accepted.

4. Mr. Kamat, thereafter has contended that the complaint also discloses offence of criminal breach of trust. In this connection, Mr. Kamat has invited my attention to section 405 of the Indian Penal Code. Section 405 in so far as it is material reads as follows :

"Whoever, being in any manner entrusted with property.....dishonestly disposes of that property in violation of any direction of law.....commits criminal breach of trust."

Clause 2 of the hypothecation agreement inter alia states :

"that the hypothecated goods.....shall be held as the Bank's exclusive property....."

It was urged by Mr. Kamat for the complainant that the hypothecated goods viz. 20 buffaloes as per clause 2 of hypothecation agreement was the bank's exclusive property which was entrusted to accused No. 1 with certain conditions and one of the conditions was that accused No. 1 was to keep security of 20 buffaloes intact and he will not dispose of or sale the said 20 buffaloes inasmuch, Clause 3 of the hypothecation agreement clearly restricted the powers of accused No. 1 to sell the property except with the previous consent of the bank. It was urged that accused No. 1 has sold the 20 buffaloes in violation of Clause 3 of the hypothecation agreement. In this connection, he has invited my attention to paragraph 3 of the complaint, wherein it was asserted that :

"I, as the Agent of the complainant bank, learnt from reliable source that the Accused No. 1 removed the 20 buffaloes from 28, Mahadwada Nizampura, Bhiwandi and hence I personally went at that place and found that the said buffaloes were missing from the said place."

In Paragraph 5 of the complaint it is asserted that :

"The complainant submits that the Accused No. 1 has no intention to repay the advances amount taken by him and he has removed from the place situate at 28, Mahadwada, Nizampura, Bhiwandi, the 20 Buffaloes hypothecated by him to the complainant Bank without the knowledge and consent of the complainant Bank and that in spite of diligent search made by this complainant, the whereabouts of the said buffaloes are not know to the complainant,"

In paragraph 7 of the complaint, it is stated:

"Accused No. 1 has dishonestly misappropriated the said 20 Buffaloes in violation of the undertaking given by him in his Agreement of Hypothecation dated the 20th June, 1974."

It is, therefore, urged that on plain reading of the complaint, as well as Clause 2 and Clause 3 of the hypothecation agreement, the complaint clearly discloses the offence u/s 405 of the Indian Penal Code.

5. This submission of Mr. Kamat also fails to impress me and has to be rejected for the following reasons. In order to appreciate this contention of Mr. Kamat, what has to be found out is as to who is the owner of the 20 Buffaloes . It is undoubtly true that Clause 2 of the hypothecation agreement clearly states that the hypothecated goods viz. the 20 buffaloes be held as Banks exclusive property. However, in Clause 15 of the Hypothecation Agreement, it is recorded that :

"The borrower (Accused No. 1) here-by declare that all the hypothecated goods (20 Buffaloes) are the absolute property of the Borrower at this sole disposal of the Borrower."

Clause 10 of the hypothecation agreement also records that in default of such payment as aforesaid, the Bank and officers shall be entitled to sell by public auction the hypothecated goods. In Clause 11 it is recorded that:

"That if the net sum realised by such sale be insufficient to cover the balance then due to the bank, the Bank shall be at liberty to apply any other money or moneys in the hands of the Bank standing to the credit of or belonging to the Borrower in or towards payment of the balance for the time being due to the Bank."

6. Thus on combined reading of Clauses 10, 11, 14 and 15 of the Hypothecation Agreement, it is clear that the hypothecated goods viz. 20 buffaloes are the absolute property of accused No. 1. If hypothecated property viz. 20 buffaloes belong to accused No. 1 the question of entrustment of the same by the bank to accused No. 1 does not arise. It appears from the recitals of the complaint that accused No. 1 in violation of Clause 3 of the Hypothecation Agreement has sold or disposed of the security viz. 20 buffaloes. This assertion is denied by accused No. 1 who says that the buffaloes have not been sold or disposed of by him, but that they are dead. Assuming for the sake of argument that accused No. 1 in violation of the hypothecation agreement has sold or disposed of the security of 20 buffaloes, in my opinion, that will give rise to civil liability and if, according to the complainant, accused No. 1 has committed breach of the hypothecation agreement, it is open for the complainant, to initiate against accused No. 1 appropriate civil proceedings. The date of transaction is 20th of June, 1974. On the same day, in addition to the hypothecation agreement, joint promissory note has also been executed by accused Nos. 1, 2 and 3 in favour of the complainant Bank. It appears that civil action if instituted, may be barred by limitation. In order to circumvent that difficulty, it appears that the present complaint has been filed by the complainant against accused. On going through the complaint and also other documents, which have been annexed to the complaint, in my opinion, offence of cheating and criminal breach of trust is not disclosed. It has been held in number of cases that when disputes between the parties is of civil nature, criminal proceedings have to be quashed. I may refer to a decision in the case of [Sardar Trilok Singh and Others Vs. Satya Deo Tripathi](#), in which it has been held :

"That the proceeding initiated was clearly an abuse of the process of the Court. It was not a case where any process ought to have been directed to be issued against the accused (appellants). On the well-settled principles of law it was a very suitable case where the criminal proceeding ought to have been quashed by the High Court in exercise of its inherent power. The dispute raised by the respondent was purely of a civil nature even assuming the facts stated by him to be substantially correct."

In another case of [Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others](#), it has been held :

"Proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers u/s 482."

In the preceding paragraphs of this judgement, I have shown that from the complaint and other documents accompanying the same, offences of cheating and criminal breach of trust are not made out.

7. After, therefore, considering the submissions made before me by Mr. Chitnis for the petitioner and Mr. Kamat for respondent No. 2 and for the reasons stated in the preceding paragraphs of this judgment, I pass the following order:

Rule is made absolute.

Rule made absolute.