(1979) 01 BOM CK 0056

Bombay High Court

Case No: Criminal Revision Application No. 548 of 1978

Moreshwar Dinanath Sawe		APPELLANT
	Vs	
Zubaldabi Haroon and Another		RESPONDENT

Date of Decision: Jan. 24, 1979

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 397(2), 457(1)

Hon'ble Judges: S.C. Pratap, J

Bench: Single Bench

Advocate: R.M. Agarwal, for the Appellant; B.Y. Deshmukh, Public Prosecutor, R.D. Hattangadi and N.C. Hombalkar, for the Respondent

Judgement

S.C. Pratap, J.

This Revision Application is directed against the order dated 4th December, 1978, passed by the learned Additional Sessions Judge, Aurangabad, in Criminal Revision No. 92 of 1978 which was preferred before him by the present respondent No. 1, Zubaidabi, challenging the order dated 1st December, 1978, passed by the Chief Judicial Magistrate, Aurangabad, on an application dated 13th October, 1978 field before him by the aforesaid Zubaidabi, for return to her of motor vehicle bearing No. CPE 8890, which I am informed is a mini luxury bus.

2. The Brief facts of the case are as follows :---

Respondent No. 1 herein, Zubaidabi, is the owner of the aforesaid motor vehicle. She purchased the chasis thereof for an amount of Rs. 1 lac sometime in the month of February 1978. After the said purchase, the chasis was converted into a regular tourist bus by incurring considerable expenditure in that behalf. The said bus was accordingly registered in the name of Zubaidabi at Indore where she was residing. The road permit in respect of the said'' bus also stood in her name. She had also obtained a loan of Rs. 45000/- from State Bank of India at Indore, in consideration of which loan the bus was hypothecated with the said Bank. From 1st June, 1978 till

21st September, 1978, the said bus was being run at Aurangabad by the petitioner herein, Moreshwar Dinanath Sawe, who will hereafter be referred to as the complainant. Zubaidabi will hereafter be referred to as "the owner". The complainant was carrying on business of motor transport and has also been running tourist buses at Aurangabad.

3. The case of the complainant has been that on 22nd September, 1978, on Haji Hanif, Gulam Nabi and Sharma, under certain mis-representations and on cheating the complainant"s cleaner, one Bhagwan, took the bus to Indore via Kannad and Chalisgaon. The complainant thereupon lodged his complaint with the City Chowk Police Station at Aurangabad on 24th September, 1978, alleging therein that the cleaner, Bhagwan, was mis-represented and cheated by the aforesaid three person. The nature of the said mis-representation and cheating would not be very relevant, so far as the present proceedings are concerned, and are not, therefore, referred to in any detail. Suffice, however, to state that the case of the complainant was that the owner"s son, Haji Hanif, had orally agreed to sell the bus in question to the complainant for a consideration of Rs. 1,33,250/- out of which the complainant had paid Rs. 18,250/- to the owner. This oral agreement is alleged to have taken place on 13th May, 1978 at Aurangabad. Inspite of the aforesaid transactions, the above referred to 3 persons mis-represented and cheated the cleaner, Bhagwan, (in the employment of the complainant) and took away the bus in question to Indore from the lawful custody of the complainant.

4. This offence was duly registered. The original F.I.R. was produced in the present proceedings. Investigation was carried out by the police, who also went to Indore where the bus was seized. The aforesaid three persons, who took the bus to Indore, were also arrested. On 26th September, 1978 the owner, Zubaidabi, made an application before the Chief Judicial Magistrate at Indore for return of the vehicle to her in her capacity as its owner. By his order dated 27th September, 1978, the Chief Judicial Magistrate of Indore directed the bus to be handed over to Zubaidabi on Suprat name on the understanding that the bus would be produced before the Chief Judicial Magistrate at Aurangabad on 13th October, 1978. The aforesaid accused person Nos. 1 to 3 were also released on bail in the sum of Rs. 2000/- each.

5. In the meanwhile, the complainant, Sawe, filed an application before the Chief Judicial Magistrate at Aurangabad, for custody of the aforesaid vehicle. The owner Zubaidabi, also made similar application. Indeed, both the complainant as also the owner filed several applications before the learned Magistrate at Aurangabad in connection with the return and/or the custody of the bus. The actual bus, however, was not produced before the learned Magistrate till 24th November, 1978, since which day the said bus is lying in the Court premises.

6. The learned Chief Judicial Magistrate took up the question as to in whose custody the bus should be handed over. Considering the application made by the complainant as also the owner and after hearing the arguments of the respective

parties, the learned Chief Judicial Magistrate, by his order dated 1st December, 1978, directed that the motor vehicle in question should be returned on bond to the complainant, Sawe. The said bond should be in the sum of Rs. 90,000/- with one surety, with the view to produce the said vehicle before the investigating agency, the Chief Judicial Magistrate at Aurangabad and any Court on appeal or revision in the matter connected with Crime Registrar No. 412/78 under sections 394 and 420 of the Indian Penal Code and trial of the said offence on charge-sheet of the Police Station pending trial and decision before the Court of the Chief Judicial Magistrate, Aurangabad, or any Court sub-ordinate to him, u/s 457(1) of the Criminal Procedure Code.

7. The aforesaid order passed by the Chief Judicial Magistrate, Aurangabad, was challenged by the owner, Zubaidabi, by preferring therefrom Criminal Revision No. 92 of 1978, to the Sessions Court, Aurangabad. The learned Additional Sessions Judge hearing the said Revision Application was pleased, by his judgment and order dated 4th December, 1978 to allow the said Revision Application set-aside the order passed by the learned trial Magistrate and direct that custody of the bus be given to the owner. Zubaidabi, on her executing a bond in the sum of Rs. 1 lac (Rupees One Lac) with one surety in the like amount. It is this order which is challenged before me by the complainant, Sawe, who has preferred therefrom this Criminal Revision Application. In support of this application, I have heard Mr. R.M. Agarwal, the learned Advocate for the complainant-petitioner herein and in reply, I have heard Mr. R.D. Hattangadi, the learned Counsel for the owner-respondent No. 1 herein. The State is represented by the learned Public Prosecutor, Mr. B.Y. Deshmukh.

8. In my opinion, it is not necessary to go into all the details of the previous history relating to the vehicle in question. Suffice to state that there is no dispute that Zubaidabi is the owner of the said vehicle. There is also no dispute that the said vehicle was being plied by the complainant, Sawe, through drivers between 1st June, 1978 and 21st September, 1978. There is also no dispute that there is no written agreement of sale representing the alleged agreement of sale set forth by the complainant, nor is there any written agreement of hire representing the alleged case of hire setup by the owner. It is also not disputed that owner had from time to time received certain payment from the complainant Sawe, and that the total of the said payments has been Rs. 18,250.

9. Both the parties sought to rely upon various different circumstances in order to claim custody of the vehicle. While the complainant set forth his title under an oral agreement of sale which was denied by the owner, the owner herself has set forth an oral agreement of hire under which agreement the bus was given to the complainant on certain terms and conditions. While deciding the question of custody in a case as of the instant nature, one cannot rightly ignore the fact that the property involved is a motor vehicle, governed and regulated by the provisions of the Motor Vehicles Act and Rules framed thereunder.

10. On the basis of certain undisputed facts, I am inclined to uphold the order passed by the learned Additional Sessions Judge, directing the vehicle to be handed over into the custody of its owner, Zubaidabi. As already mentioned hereinabove she is admittedly the owner of the vehicle. There is no written document of agreement of sale executed either by the owner or by her son in favour of the complainant Sawe. The bus also stands in the name of the owner herself in the record of the Regional Transport Authority. The insurance policy also stands in her name. The road permit relating to the said bus also stands in her own name. It is pertinent to note that the complainant''s own case has been that the agreement of sale was not with the owner, Zubaidabi but with her son. Again, pertinent is the fact the thought complainant own case has been that under the terms of the said agreement of sale, he was to pay a sum of Rs. 5000/- per month to the owner and the transaction had to be completed by October 1978, he had paid from June to September, 1978 only Rs. 18000/- and odd leaving a large outstanding balance of over Rs. 1,00,000/- (Rupees one Lac).

11. Over and above these circumstances which certainly favour the owner Zubaidabi, other circumstances on the record also make it more reasonable and more in the interest of justice the bus should be returned to the custody of the owner. Even while the bus was in the custody of the complainant, record shows that it was being driven for most of the time by none else than Gulam, the driver of the owner herself. This factor supports case of hire and is consistent with sale. If the bus had orally been agreed to be sold and if possession had been parted in pursuance of such an agreement, it is not possible that the person who has sold the bus, would continue the driver in her employment for no reason whatsoever. Here is a case where it is the owner''s driver Gulam who has been for most of the time driving the bus in question even after the same was given to the complainant Sawe. The complainant has not been able to produce any evidence to show that the driver Gulam was thereafter taken by him in his own employment. Indeed, there is hardly any serious dispute about the fact that the said driver Gulam continued to be in the employment of the owner Zubaidabi. Again the aforesaid insignificant payment of Rs. 18,000/- and odd as late as till September, 1978, to the owner also indicates that in all probability it is towards the hire charges of Rs. 250/- per day. It could not be towards the alleged purchase price of Rs. 1,33,250/-, the entire amount where of had to be paid by October 1978 by which time, according to the complainant himself, the transaction of sale had to be completed. It is, however, sought to be contended that the agreement of sale gets corroboration from the fact that the vehicle in question was being plied with a plate ''Savera Transport'' which was the plate of the complainant. This circumstance, however, in my opinion does not support the case of an agreement of sale. On the contrary, it is perfectly consistent even with the case of the vehicle being given on hire.

12. Though of course these are not proceedings where the Court has to consider and decide question of title to the vehicle in question, still and nevertheless, while

deciding the question of return of the vehicle in question, the Court must necessarily, though to a limited extent, go into and find out the probabilities of the case as set up by the rival parties in order to decide the question of custody of the vehicle. On that basis, I have no doubt that the evidence such as there is on the record more than amply supports the case of the owner. As stated above, the ownership is admitted. The record of the Regional Transport Authority as also the road permit continues to be in her name. Her own driver continued for the most part to drive the vehicle in question. Even the alleged agreement of sale is not with her but with her son, which circumstances also, inter alia, makes the validity of such an agreement doubtful. These factors together with absence of any congent material on the side of the complainant makes an inference rather irresistible that this is pre-eminency a case where the vehicle in question should be directed to be given into the possession and custody of its owner.

13. Though not considerable in the courts below, the learned Counsel, Mr. Hattangadi, has put before this Court one additional circumstance as to why the vehicle should be returned to the owner. According to him, this is a case relating to an operating motor vehicle which is compulsorily insured. According to him, further, an operating motor vehicle may undergo an accident resulting in injuries, fatal or otherwise. This in consequence can result in claim by third party not only against the driver and the Insurance Company but also against the owner thereof. If this test is to be applied, the owner gets additional support to her. It would not be the complainant who would normally be responsible as a result of any accident and it would normally be the owner who would be liable for damages or otherwise in that behalf. One cannot, therefore, order return of such an operating vehicle to a party who may not be responsible for any liability arising in respect of the said vehicle as a result of any accident, etc. In this behalf the learned Counsel has also referred to an authority of the Gujarat High Court in Nandiram Vs. State of Gujarat and Others, . I am in agreement with the ratio of the said ruling holding that in respect of a motor vehicle, possession is not by itself a good criterion for granting custody and that a person in whose name the vehicle stands with registering authority is entitled to its custody unless any other person establishes his superior title. This is not a case where the complainant can be said to have established any superior title. On the contrary, his case of an agreement of sale is, if I may say so, very difficult of acceptance at this prima facie stage. This difficulty is enhanced by the fact that there is no written document in that behalf and by the further fact that even the alleged agreement is not with the owner but her son.

14. Mr. R.M. Agarwal, the learned Advocate for the complainant has referred me to a decision of the Nagpur Bench of this Court in Ghaffor Bhai Nabu Bhai Tawar Vs. Motiram Keshaorao Bongirwar and Others, and contended that case was also one relating to a motor vehicle and yet the Court granted its custody not to its owner but to one claiming the same under an agreement of sale. The said ruling is, however, in my opinion, clearly distinguishable. In that case there was a written contract of sale,

such is not the case here. Again, in that case the written contract of sale was with the owner of the property in question. Such again is not the case here. Furthermore there is in the present matter a case of hire of the vehicle in question. Such was not the case in the reported ruling. In these circumstances, the very substratum of the ratio of the aforesaid ruling is found to be altogether different from the one in the present case. Consequently, it is not possible to rely upon the said ruling in favour of the complainant herein. It is, however, petitioner to note that even in the said ruling, it has been held that the term "the person entitled to the possession of the property" cannot be equated with actual possession and what was material was as to which of the two claimants was entitled to possession of the property. In the circumstances, the fact that the complainant here claimed to be in possession of the vehicle cannot by itself be said to be conclusive of the matter. If Zubaidabi can establish her superior title to the property and if complainant''s possession can be consistent with the case of a hire the proper order would be to direct return of the property to its owner and, being an operating vehicle, to her care and responsibility.

15. Mr. Agarwal, the learned Advocate for the complainant, has raised one me contention which, according to him, goes to the root of the matter and is not much connected with the merits and that contention, according to him, is that from the impugned order passed by the learned Chief Judicial Magistrate on 1st December, 1978, no revision lay to the Sessions Court and, therefore, Criminal Revision No. 92 of 1978 preferred therefrom by the owner Zubaidabi, was liable to be and should have been dismissed on the preliminary ground that it was not maintainable at all. According to the learned Advocate the impugned order aforesaid was purely an interlocutory order and under the provisions of sub-section 2 of section 397 of the Code of Criminal Procedure, 1974, the powers of revision conferred by sub-section (1) of section 397 cannot be exercised in relation to any interlocutory order passed in any appeal, enquiry, or trial of a person. The contention though ex facie attractive, does not, in my opinion, stand the test of closer scrutiny.

16. This is not a case where the impugned order of the learned Magistrate can be said to be an interlocutory order in the true sense of that term. No doubt it is an order passed in a proceedings; no doubt the said order does not dispose of the main criminal trial. But these circumstances do not necessarily render the impugned order an interlocutory order as such. This is a case where it is a third party viz, Zubaidabi who made an application to a Criminal Court for return of property seized by the police and of which property she claims to be the owner. She is not a party to the criminal proceedings. Indeed, even the complainant Sawe is not, strictly speaking, a party to the criminal proceedings. He has only filed a complaint with the police. As a result of investigations on his complaint, the police may file a charge-sheet in the Court and thereafter trial which is yet to commence, may take place. The complainant also, therefore, strictly speaking, cannot be said to be a party as such to the criminal proceedings before the Court. This was, therefore, case where two persons, neither of whom is a party to the criminal proceedings in the

Court, claim return of property seized by the police in the course of investigation. Order passed in such a matter cannot, therefore, be said to be an interlocutory order. Of course it also may not be said to be a final order in the sense that the criminal proceedings are by this order finally disposed of but that is besides the point. It is not necessary for this Court to decide whether the order is final or not. All orders which are not final need not necessarily be interlocutory. In my opinion, it would be a misnomer to call the impugned order an interlocutory order. Not being an interlocutory order, I see no difficulty in holding that it can be challenged by way of a revision application and that powers of revision u/s 397 of the Code of Criminal Procedure can be exercised in respect thereto. Mr. Hattangadi, the learned Counsel for respondent No. 1, herein, relied upon a decision of this Court in (Criminal Revision Application No. 237 of 1977, decided by Dighe, J. on 13th July, 1977). The said decision undoubtedly supports him. However, even apart from the said decision and independently of it, I am of he view that the impugned order in the present case cannot be termed as an interlocutory order and therefore, there is not bar in revising the said order under powers of revision conferred by section 397 (1) of the Code of Criminal Procedure.

17. On the aforesaid contention, Mr. Agarwal, the learned Advocate relied upon a decision of the Supreme Court in Madhu Limaye Vs. The State of Maharashtra, I do not see how this decision supports him. On the contrary, while analysing the provisions of sub-section (2) of section 397 of the Code of Criminal Procedure, 1974, it was observed in the aforesaid ruling as follows :---

"Ordinarily and generally the expression ''interlocutory order'' has been understood and taken to mean as a converse of the term "final order".....But ....an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so, it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code."

".....Although the words occurring in a particular statute are plain the unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the Legislature. On the one hand, the Legislature kept intact the revisional power of the High Court and, on the other, it put a bar on the exercise of that power in relation to any interlocutory order. In such a situation it appears that the real intention of the Legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order".

18. The legal position is thus crystallized by the Supreme Court in the aforesaid ruling and the ratio thereof clearly applies to the facts of the present case. The contention of the learned Advocate Mr. Agarwal, regarding the maintainability of revision application before the Sessions Court must, therefore, fail. The said revision did lie and was maintainable and it was consequently open to the Sessions Court to entertain and dispose of the same on its own merits.

19. In the result, there is no reason to interfere with the order passed by the learned Additional Sessions Judge. This Revision Application, therefore, fails and is dismissed.

20. Rule is discharged.

21. Stay is vacated.

22. At this stage, Mr. Agarwal, the learned Advocate for the complainant, seeks leave to appeal to the Supreme Court under Article 134(1)(c) of the Constitute of India. In my opinion, this is not a fit case for granting such leave. On facts themselves, I have found the impugned order to be correct. Not only so, but also cannot ignore that the order for return of the vehicle in question to its owner is, apart from the other factors and circumstances, an order passed basically in the discretion of the lower Court. The exercise of the said discretion could not have been, even otherwise, lightly interfered with by this Court. Moreover, the bond of Rs. 1,00,000/- (Rupees On lac) with one surety in the like amount directed to be given by the owner also protects the interests, if any, of the complainant. Again, by my present decision I have not decided any important question. On the contrary, I am merely confirming the discretionary order passed by the Court below. In the circumstances, I see no reason to certify that this case is a fit one for appeal to the Supreme Court. Leave is, therefore, refused.

23. Mr. R.D. Hattangadi, the learned Counsel for the owner respondent No. 1 Zubaidabi, makes a statement before this Court that though respondent No. 1 may take steps for complying with the required formalities with a view to take possession of the vehicle in question, she will not take actual possession of the vehicle for a period of two weeks from today.