

(2003) 02 BOM CK 0156

Bombay High Court (Nagpur Bench)

Case No: Criminal Application No's. 1598 and 1678 of 1999

Milind Rokade

APPELLANT

Vs

State of Maharashtra and

RESPONDENT

Another

Date of Decision: Feb. 10, 2003

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 397(2), 451, 457

Citation: (2003) BomCR(Cri) 1448 : (2003) 2 MhLJ 735 : (2003) 4 RCR(Civil) 510

Hon'ble Judges: S.T. Kharche, J

Bench: Single Bench

Advocate: B.P. Maldhure, in Criminal application No. 1598 of 1999 and S.A. Brahme, in Criminal application No. 1678 of 1999, for the Appellant; T.R. Kankale, Assistant Public Prosecutor for respondent No. 1 and S.A. Bramhe, in Criminal Application No. 1598 of 1999 and T.R. Kankale, Assistant Public Prosecutor for respondent No. 1 and B.P. Maldhure, in Criminal Application No. 1678 of 1999, for the Respondent

Judgement

S.T. Karche, J.

Rule taken up for final hearing with the consent of the parties.

2. Heard the learned counsel for the applicant, learned A.P.P. for respondent No. 1 and the learned counsel for respondent No. 2 in both the applications.
3. These two applications involve common question of facts and law and, therefore, they are disposed of by this common judgment. The short question that arises for consideration in these proceedings is whether interim custody of the motor vehicle can be given pending the criminal prosecution.
4. Applicant/accused Milind is the nephew of complainant Arvind. Both of them contended that the Hero Honda Motorcycle is owned by them and, therefore, sought the release of the said motorcycle on supratnama by filing applications before the learned J.M.F.C., whereby the applications filed by both of them came to

be rejected. Being aggrieved by the said order, criminal revisions were filed in the Court of Sessions Judge and the said criminal revisions were also dismissed.

5. In Criminal Appln. No. 1598/99 it is contended that the applicant Milind is the owner of Hero Honda motor cycle bearing registration No. MH-31//L-5096 and it was transferred to him by his paternal uncle, Arvind Tanbaji Rokade, on 16-3-1998. It is contended that on that day the transfer papers were signed and were handed over along with the said motor cycle to the applicant. It is contended that on 24-4-1998 Arvind lodged a complaint at police station Ganeshpeth about the theft of the two wheeler motor cycle and an offence came to be registered u/s 379 of Indian Penal Code bearing Crime No. 199 of 1998. According to the complainant Arvind, he was the registered owner of the said Hero Honda motor-cycle which was stolen on 22-4-1998 at about 7-00 p.m. from the premises of his office. The name of the suspect was not mentioned in the report. It is contended that the traffic police had challaned the said Hero Honda motorcycle of the applicant Milind on 22-4-1998 at about 11-00 a.m. and he was required to pay a fine of Rs. 100/- on that day. It is contended that the P.S.O. of Ganeshpeth police station called the applicant Milind along with the Hero Honda motorcycle in the police station on 2-5-1998. He appeared in the police station along with the documents of the motor cycle. The P.S.O. was satisfied with the documents of the motor cycle and allowed the applicant Milind to take away the vehicle. The Deputy Police Inspector, Ganeshpeth police station, had visited the R.T.O. and enquired about the ownership of the vehicle in question and when the R.T.O. assured him that the documents of the vehicle in question in possession of the applicant Milind were genuine and that the vehicle was transferred in his name, prepared "B" summary to submit it in the Court. Thereafter on 25-7-1998, the applicant was again called in the police station and at that time the said Hero Honda motorcycle was seized and, as such, it is in the custody of the police.

6. In Cri. Appln. No. 1678/99, the case of the applicant/complainant Arvind is that the said Hero Honda motorcycle bearing registration No. MH-31/L-5096 was stolen away and hence he had lodged report against Milind on 24-4-1998 on the basis of which offence u/s 379 of Indian Penal Code vide Crime No. 119 of 1998 was registered and the said Hero Honda motorcycle was seized from the possession of Milind. Thereafter he had filed an application for return of the said vehicle on supratnama in the Court of learned J.M.F.C. which came to be rejected. Being aggrieved by that order, revision was filed in the Court of learned Sessions Judge and the revision also came to be rejected on the ground that no interference was required in the interim order passed by this Court.

7. The learned counsel for Milind Rokade contended that the said Hero Honda motorcycle was transferred in his name by Arvind on 16-3-1998 and the necessary entries were recorded in the R.T.O. records. She further contended that it is Milind Rokade who was in possession of the said Hero Honda motor cycle in consequence

of the transfer of the said vehicle and on 22-4-1998 it was he who was challaned by the traffic police for which he had paid a fine of Rs. 100/. She contended that the said vehicle was transferred in lieu of the arrears of salary as Milind is said to have been working with his uncle Arvind Rokade. Therefore, according to her, it is Milind who is the registered owner of the Hero Honda motorcycle and he is entitled to the interim custody as per the provisions of Code of Criminal Procedure. She contended that the orders passed by both the Courts below are not sustainable in law.

8. Mr. Bramhe, learned counsel for Arvind, contended that it is Arvind who is the original registered owner of the Hero Honda motor cycle. He contended that the said motorcycle was found stolen on 22-4-1998 and, therefore, Arvind had lodged a report at police station Ganeshpeth on 24-4-1998. Thereafter police had seized the said motorcycle from Milind on 23-7-1998. He contended that the son of Arvind was challaned by the traffic police on 7-4-1998 and on that day the Hero Honda motorcycle was in possession of Arvind. The learned counsel contended that Arvind, being the original registered owner of the said motorcycle, is entitled to its interim custody on supratnama. The learned counsel further contended that the original record from R.T.O. office is missing and Milind and the officials from R.T.O."s office have been prosecuted by the police for the offence punishable u/s 420 of Indian Penal Code. The learned counsel contended that the impugned orders passed by both the Courts below are not sustainable in law.

9. The learned A.P. P. contended that the learned Magistrate by his order dated 23-12-1998 rejected the application filed by Milind for getting the vehicle in question and he observed that the vehicle in question was transferred in the name of Milind on 16-3-1998, however Form No. 29 was not made available as the same were not traceable in the office of R.T.O. In absence of original signature of the complainant, the learned trial Court found it difficult to accept the transfer made by the R.T.O. which is suspicious. It is further contended that Milind did not give any detail as to when and how he purchased the vehicle in question from the complainant Arvind. He contended that the complaint was made on 24-4-1998 by Arvind and the vehicle is said to have been transferred in the name of Milind prior to one month, i.e. 16-3-1998. He contended that initially the vehicle was in the name of complainant Arvind and the investigation revealed that the vehicle was in possession of the complainant till 22-4-1998. Under these circumstances, the position about ownership of the vehicle is not made clear and release of the vehicle in favour of any of the parties would not be proper and, therefore, the impugned orders passed by both the Courts below are sustainable in law.

10. I have given thoughtful consideration to the contentions canvassed by the learned counsel for the respective parties. It is not disputed that Arvind is the erstwhile registered owner of the Hero Honda motorcycle involved in the case. The report of theft of the motorcycle was lodged on 24-4-1998 by Arvind at police station Ganeshpeth on the basis of which Crime No. 119 of 1998 was registered against

Milind. It is also not disputed that the said Hero Honda motorcycle was seized from the possession of Milind on 23-7-1998.

11. It is true that the aspect of transfer of the motorcycle involved in question is disputed though, according to Milind, the said vehicle was transferred in his name on 16-3-1998 and the entries were recorded in the R.T.O. records. It also appears that during the course of investigation it was found that the original R.T.O. record is missing and, therefore, Milind and the officials from R.T.O. office have been prosecuted for the offence punishable u/s 420 of Indian Penal Code. Be that as it may. It is obvious that the interim custody can be given to the party on execution of supratnama under the provisions of Code of Criminal Procedure, In order to appreciate the contentions of the parties, it would be appropriate to refer Sections 451 and 457 of the Code of Criminal Procedure which are as under:

"451. Order for custody and disposal of property pending trial in certain cases.--When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.--for the purposes of this section, "property," includes

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

457. Procedure by police upon seizure of property--(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

12. Now, I may usefully refer the latest decision of Apex Court in the case of Sunderbhai Ambalal Desai v. State of Gujarat in SLP (Cri.) No. 2745 of 2002 wherein it

has been observed as under:

"Section 451 clearly empowers the Court to pass appropriate orders with regard to such property, such as

- (1) for the proper custody pending conclusion of the inquiry or trial;
- (2) to order it to be sold or otherwise disposed of, after recording such evidence as it thinks necessary;
- (3) if the property is subject to speedy and natural decay, to dispose of the same.

It is submitted that despite wide powers, proper orders are not passed by the Courts. It is also pointed out that in the State of Gujarat there is Gujarat Police Manual for disposal and custody of such articles. As per the Manual also, various circulars are issued for maintenance of proper registers for keeping the Muddemal articles in safe custody. In our view, the powers u/s 451, Criminal Procedure Code should be exercised expeditiously and judiciously. It would serve various purposes, namely :--

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation.
2. Court or the police would not be required to keep the article in safe custody.
3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and
4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of pampering with the articles."

The Supreme Court further observed thus :

"The question of proper custody of the seized articles is raised in number of matters. In Smt. Basava Kom Dyamogouda Patil Vs. State of Mysore and Another, this Court dealt with a case where the seized articles were not available for being returned to the complainant. In that case, the recovered ornaments were kept in a trunk in the police station and later it was found missing, the question was with regard to payment of those articles. In that context, the Court observed as under:

"4. The object and scheme of the various provisions of the Code appear to be that Where the property which has been the subject matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property

may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance."

The Court further observed that where the property is stolen, lost or destroyed and there is no *prima facie* defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.

13. The Supreme Court thereafter issued general directions to all the Courts in such matters to exercise the powers u/s 451 of the Code of Criminal Procedure promptly and at the earliest. The Supreme Court also took into consideration as to what should be done in respect of the property which is motor vehicles seized during the course of investigation. It has been observed in paras Nos. 11 and 12 as under :

"Learned senior counsel Mr. Dholakia, appearing for the State of Gujarat further submitted that at present in the police station, premises, number of vehicles are kept unattended and vehicles become junk day by day. It is his contention that appropriate directions should be given to the Magistrates who are dealing with such questions to hand over such vehicles to its owner or to the person from whom the said vehicles are seized by taking appropriate bond and the guarantee for the return of the said vehicles if required by the Court at any point of time.

However, the learned counsel appearing for the petitioners submitted that this question of handing over vehicles to the person from whom it is seized or to its true owner is always a matter of litigation and a lot of arguments are advanced by the concerned persons. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the directions of the Court. The court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchanama should be prepared."

14. In view of the observations of Supreme Court which are binding on all the Courts, it is obvious that the impugned orders passed by both the Courts below that the motorcycle involved in this case cannot be returned on execution of supratnama till the issue of title is adjudicated, cannot be sustained in law. The finding of the learned Sessions Judge that the order passed by the learned Magistrate is an interlocutory order and Revision against it does not lie, is erroneous and cannot be upheld. The jurisdiction of the Sessions Judge is not ousted as per Section 397(2) of the Code of Criminal Procedure. The order granting or refusing to return the property cannot be treated as an interlocutory especially when the substantial rights of the parties are affected.

15. In the present case, the evidence indicate that Arvind was the erstwhile registered owner of the motorcycle but for transfer of the same on 16-3-1998. The entry of transfer also appears to have been recorded in the R.T.O. record and this fact is sought to be proved by production of xerox copy issued by the R.T.O., Nagpur. The registration certificate indicate that the vehicle was transferred in the name of Milind Prabhakar Roka"de by the original owner Arvind Tanbaji Rokade and the registration particulars indicate that it was transferred on 16-3-1998 and he is the subsequent registered owner. It is also not disputed that the original record of R.T.O. is missing for which the officials from the R.T.O. office along with Milind are facing criminal prosecution u/s 420 of Indian Penal Code. At this stage, this Court is not supposed to adjudicate on these points. What is relevant to note is that there was a delivery of possession of this vehicle and it would clearly reveal that on 22-4-1998 Milind was challaned by the traffic police and he was required to pay a fine of Rs. 100/- by the receipt issued on the same day in respect of the same Hero Honda motor-cycle bearing No. MH-31/L-5096. This fact would go to show that on 22-4-1998 Milind was in possession of the said Hero Honda motorcycle. If at all the motorcycle was stolen away by Milind on 22-4-1998 then in that case Arvind would not have failed to report the matter to the police immediately, but it appears that the report of theft has been lodged on 24-4-1998 and that too it must be after due deliberations.

16. It is also pertinent to note that the Hero Honda motorcycle involved in the crime has been seized from the possession of Milind on 23-7-1998 and the seizure panchanama was drawn by the investigating officer wherein the recitals appear that Milind was the owner of the said vehicle on that day, he had brought it to the police station and thereafter it was seized. Fact remains that at least from 22-4-1998 till 23-7-1998 the Hero Honda motorcycle was in possession of Milind. Whether the transaction of sale or purchase of the said motorcycle is a valid or frivolous is a separate issue which can be considered, if necessary, by the civil court. What reveals from all these facts is that Milind was undisputedly in possession of the said vehicle since 22-4-1998 till its seizure and, therefore, I am of the considered view that Milind is entitled to the interim custody of the said motorcycle on execution of the Supratnama. The orders passed by both the Courts below resulted into miscarriage of justice. This Court is required to exercise the inherent powers u/s 482 of the Code of Criminal Procedure and, therefore, the said motorcycle be returned to Milind Prabhakar Rokade on execution of supratnama and also on furnishing guarantee to the satisfaction of the learned Magistrate. The photograph of the vehicle while handing over the same to Milind be taken and retained on record of the criminal case along with panchanama. I must not be taken to have expressed any opinion regarding the merits of the case or regarding the title of the Hero Honda motorcycle involved in the complaint and the trial Court shall proceed with the case without being influenced by the observations made in this judgment. With these directions, Criminal Appln. No.1598 of 1999 is allowed and Criminal Appln. No. 1678 of 1999 is dismissed.

Copy of this judgment be given to the parties concerned, on payment of necessary copying charges, to act upon.