

CASE NO.:
Appeal (crl.) 1443 of 2007

PETITIONER:
All Cargo Movers (I) Pvt. Ltd. & Ors

RESPONDENT:
Dhanesh Badarmal Jain & Anr

DATE OF JUDGMENT: 12/10/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No.1547 of 2007)

S.B. Sinha, J.

1. Leave granted.
2. The parties hereto entered into a contract of carriage. First Respondent approached the appellants which are companies registered and incorporated under the Indian Companies Act for delivery of six consignments valued at US \$ 98,715.29 to the original consignee, M/s. Universal Apparels (EPZ), Mombassa, Kenya. By reason of a fax message, Appellants asked their counterparts in Mombassa, Kenya (Walford Meadows) to confirm delivery of consignment asking it to see that the cargo is delivered only against presentation of original Bills of Lading. The goods in question were said to have been delivered by the agent of the petitioner to the original consignee but the same allegedly was rejected on the ground of being inferior in quality. Goods are said to have been delivered to M/s. Fashionette Industries Ltd. Complainant-Respondent issued a notice to the accused persons as also the aforementioned Walford Meadows and M/s. Universal Apparels stating :

\023That with utter disregard to the procedures and practice prevalent internationally, and being fully conscious of the consequences of delivering the consignments without production of the Bills of Lading, you M/s. Walford Meadows Ltd., as agents of the Carrier at Mombassa Ltd. effected delivery of the consignments covered under the aforesaid original bills of lading to the consignees, without their producing the Bills of Lading. That my clients are shocked at your act of negligence, which is contrary, violative and in breach of your duties under the Contract and Law.\024

4. Negligence was, thus, attributed to the agencies in delivering the cargo without the original Bill of Lading. It was also alleged that the carriers and their agent have committed a breach of carriage and acted in violation of their contract and obligation. A claim for a sum of US\$ 84,353.31 was made. In the said notice, it was stated :
\023That you, M/s. Walford Meadows, sent a fax dated 19.9.1996 to M/s Universal Apparels, copy of which was faxed to my clients by you M/s All Cargo Movers (India) Pvt. Ltd. By the said fax, you M/s Walford Meadows Ltd. have clearly pointed out the procedures to be followed in respect of Through Bills of Lading or House Bills of Lading and have admitted that no cargo should be released to the importer without the

presentation of the original Bills of Lading. That you, M/s. Walford have gone one step further and stated that you had delivered the consignments to Universal Apparels as a favour, since Universal Apparels were your regular customers etc. etc. and lodged a claim for the value of the said consignments being the amount they have been debited with you, M/s. All Cargo.\024

5. On or about 14.9.1996, Mahabir Apparels in a letter addressed to the petitioner company, lodged a statement of claim stating :

\023PLEASE TREAT THIS AS OUR FORMAL CLAIM FOR RS.27,87,795/- INVOLVED ON THIS CONSIGNMENT. YOU ARE HEREBY ADVISED TO LOOK INTO THE MATTER AND GIVE US THE EXACT STATUS OF THE ABOVE CARGOES IMMEDIATELY.\024

6. Yet again by a fax message dated 19.9.1996 sent by Darius Macharo to the Universal Apparels, it was stated :

\023The above shipments were realeased and delivered to you without your showing to us the original Bills of Lading. The procedure of the through bills of lading or house bills of lading (illegible) should be released to the importer without presentation of the original bill of lading. However, this favour was extended to you because

1. You are our regular customer.
2. To save you for heavy post storage charges which you would ((illegible) you were to wait until you got the original bill from your supplier.

3. You needed the material very urgently as you were out of stock. We have now been advised by our Principals, All Cargo that your supplier Mahavir Apparels is demanding US Dollar 84,353.31 from us as we released the goods in absence of the original B/L. (illegible)

Please revert now as we have to advise our Principal in India before close of business today. In the meantime we are holding all your shipments until this matter is resolved.\024

7. A copy of the said fax message was sent to the appellant herein stating:

\023CC : All Cargo India, Mumbai.

Attn : Vevek Kele

We shall come back to you with full details upon receiving reply from Universal Apparels. Cargo was released without Bank Guarantee.\024

8. A bare perusal of the aforementioned letters/notices would clearly indicate that no allegation had been made at the material time that it was the appellant who had caused delivery of the goods.

9. It is furthermore not in dispute that a suit has been filed by the respondent herein in the Original Side of the Bombay high Court which has been marked as suit No.1861 of 1997.

10. In the said suit, the following have been arrayed as defendants :
\0231. ACE Lines Ltd. a company

Incorporated under Foreign Laws,
Having its office at 29 Bis Mere
Bathelemy Street, Port Louis,
Mauritius.

2. All Cargo Container Lines Ltd.

A company incorporated under
Foreign laws having its office at
29, Bis Mere, Bathelemy Street,
Port Louis Mauritius.

3. All Cargo Movers (India) Pvt. Ltd.

A company incorporated in India
Under the Companies Act, 1956
And having its office at 204,
National Insurance Building,
Dr. D.N. Road, Bombay \026 400001.

4. M/s Walford Meadows Limited,
A company incorporated under
Foreign Laws having its office at
1st American Bank Building,
2nd Floor, No.1 Avenue,
Mombassa.\024

11. Whereas defendant Nos.1 to 3 are alleged to be inter-related/sister companies, the fourth defendant is said to be their agent. In the said suit, neither the aforementioned M/s. Walford Meadows Ltd. nor M/s. Universal Apparels have been implicated as parties. Plaintiff in the said suit averred that entrustment of the six consignments have been made to Mahabir Apparels. The case made out in the plaint by the first respondents is as under :

\023The respective ships carrying the said six consignments sailed from the Port of Bombay on different dates and arrived at Mombassa. The 3rd Defendants addressed 2 fax messages dated 30.8.1996 and 2.9.1996 to the 4th Defendant specifically instructing them to deliver the said six consignments only against presentation of original Bills of Lading. The Plaintiff is crave leave to refer to and rely upon the aforesaid correspondence.

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The plaintiff immediately addressed a fax dated 11.9.1996 to the 3rd Defendant (with a copy to M/s. Harilal Bhawanji) questioning the legality, propriety in giving delivery of the cargo without production of the Bills of Lading. The plaintiff also pointed out that they had not given any written permission to give delivery of the cargo without production of the Bills of Lading. The Plaintiff whilst emphasizing that the matter was very serious informed the 3rd Defendant to inform their Mombassa Agents not to release the goods without production of the original Bills of Lading in respect of their consignments. The plaintiff craves leave to refer to and rely upon the said correspondence when produced.

12. The said suit is still pending. More than one year after filing of the said suit, i.e., on or about 6.5.1998, a complaint petition was filed wherein, inter alia, it was alleged :

\023Thereafter in and subsequent to September, 1996, the complainant was shocked to learn that the

accused have delivered away the goods materials of the complainant\022s above described 6 consignments without \026 presentation of and securing the original 6 Bills of Lading, which were till with the complainant and not negotiated i.e. paid off by the purchasing party and thus the accused in abetment of each other and acting in common concern have committed criminal breach of Trust by causing criminal misappropriation of the valuable property of the complainant and have committed offences punishable u/s.407, 34 and 114 of I.P. Code.

By issuing their said Bills of Lading in acceptance and compliance of the complainants invoices, the accused represented, assured and induced the complainant to believe that the complainant\022s goods \026 material delivered to the accused by the complainant would be delivered by the accused to the receiving party only \023TO ORDER\024 i.e. only on the presentation of original bills of Lading to the party receiving the delivery of the goods material. If the accused had not to represented assured and induced the complainant, he would not have risked his goods material of the value of US\$ 98,715.29 (i.e. Rs.38,49,896.31 at dollar rate about Rs.39/-) to be delivered to the accused. Thus, the accused have in abetment and concert of each other, cheated the complainant and committed offences u/s 420, 34 and 114 of I.P. Code.\024

13. Agent of the Kenyan counterpart of the petitioner, namely M/s. Walford Meadows Ltd. against whom allegations have been made that it had delivered the consignments to the assignee without original bills of lading had not been made an accused.

14. A bare perusal of the complaint petition would show that it did not contain any averment in regard to the ingredients of the offence under Sections 406 and 420 of the Indian Penal Code. There is no allegation that it was the petitioner who had delivered the goods.

15. An application for quashing of the order issuing summons to the appellant by the learned Metropolitan Magistrate has been dismissed by the High Court of Gujarat by reason of the impugned judgment dated 19.1.2007 holding :

\023Perusing the complaint in light of the above arguments and legal propositions, it was clear that the allegations made therein, prima facie, disclosed the offence of breach of trust and the important averments were substantiated by the statement on oath of the complainant. There is no reason to examine the documents and defences of the petitioner at this stage to find out whether the complainant was likely to result in conviction. It is not established though alleged, either that the complainant did not disclose any offence or that the criminal proceedings were a gross abuse of the process of law, instead, it appears from the record that hearing of the present petition is unduly delayed after grant of ex-parte interim relief on 1.9.1998. Therefore, petition is dismissed, Rule is discharged and interim relief is vacated with no order as to costs.

16. Mr. P.H. Parekh, learned counsel appearing on behalf of the respondents, has drawn our attention to several documents to show that it had all along been contended by the first respondent that the appellant was also guilty of violating the terms of the Bill of Lading.

17. We are of the opinion that the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, do not disclose an offence. For the said purpose, This Court may not only take into consideration the admitted facts but it is also permissible to look into the pleadings of the plaintiff-respondent No.1 in the suit. No allegation whatsoever was made against the appellants herein in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simpliciter does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice.

18. In *G. Sagar Suri & Anr. v. State of U.P. & Ors.* [(2000) 2 SCC 636, this Court opined :

\0238. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

19. Therein also, having regard to the fact that a criminal complaint under Section 138 of the Negotiable Instruments Act had already been pending, a criminal complaint under Section 406/420 was initiated which was found to be an abuse of the due process of law.

20. In *Anil Mahajan v. Bhore Industries Ltd. & Anr.* [(2005) 10 SCC 228], this Court held :

\0238. The substance of the complaint is to be seen. Mere use of the expression \023cheating\024 in the complaint is of no consequence. Except mention of the words \023deceive\024 and \023cheat\024 in the complaint filed before the Magistrate and \023cheating\024 in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs.3,05,39,086 out of the total amount of Rs.3,38,62,860 was paid leaving balance of Rs.33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant\022s own case is that over rupees three crores was paid and for balance, the

accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.\024

21. In Hira Lal Hari Lal Bhagwati v. CBI, New Delhi [(2003) 5 SCC 257], this Court opined :

\023It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption . As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Indian Penal Code does not arise.\024

{See also Hira Lal Hari Lal Bhagwati v. CBI, New Delhi [(2005) 3 SCC 670] and Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736]}.

22. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. Appeal is allowed and the order taking cognizance against the appellant is set aside.