

Rajaram Shaw and Etc. Vs. State

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Court : Kolkata

Decided On : Jul-17-1997

Reported in : 1998CriLJ592

Judge : Dibyendu Bhusan Dutta, J.

Acts : Railway Property (Unlawful Possession) Act, 1966 - Section 3; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 219, 220, 221, 223, 401, 464 and 482

Appeal No. : Crl. Revn. No. 1123 of 1991 and Cri. Revn. No. 1975 of 1994

Appellant : Rajaram Shaw and Etc.

Respondent : State

Advocate for Def. : Kazi Mohammad Ali and ;Sipra Chandra, Adv.

Advocate for Pet/Ap. : Sudipto Moitra and ;S. Panchal, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

Dibyendu Bhusan Dutta, J.

1. These two cases arose thus.

2. On 24-4-91 at about 1 -50 hours, on Ramji Prasad ASI/RPF/LCD found one Dhanbahadur Gurung and his associates in unlawful possession of some Railway properties at pocket siding of LCD Post. Ramji Prasad succeeded in arresting only Dhanbahadur Gurung with those properties while two of his associates namely Munna Bahadur and Mohan Kumar Gurung managed to flee away. No satisfactory reply could be offered by Dhanbahadur to account for the possession of the said railway properties which were seized. On interrogation, Dhanbahadur Gurung made a revelation that he used to sell the stolen railway property to the shops-cum-godowns of one Rajaram of Lalababu Shire Road, Belur and one Arun of Tarachand Ganguly Street, Bally. On the basis of a complaint lodged by the ASI Ramji Prasad with LCD/RPF/Post, case No. 1(4) 1991 dated 24-4-91 was registered under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966 at RPF Post LCD. In this connexion, two search warrants in respect of the above two shops cum godowns and two warrants of arrest against the two associates of Dhanbahadur Gurung namely Munabahadur and Mohan Kumar Gurung were obtained from the Court of SDJM, Howrah and on 3-5-91, on the strength of one of the search warrants, the shop cum godown of the said Rajaram at 11, Lalababu Shire Road, Belur was searched and the search led to the recovery of some railway properties which were seized. On Chhotelal Shaw, son of Rajaram, was present in the said shop at the time of search and seizure and was arrested. The trade licence (No. 524 dated 20-12-90) issued by the Municipality in respect of the said shop cum godown stood in favour of not only Rajaram but also one Mangru and one Munilal Shaw. Several attempts were made to execute the search warrant in respect of the shop cum godown of Arun but it was found to be closed with lock and key. Attempts were also made to execute the warrants of arrest against Munna Bahadur and Mohan Kumar Gurung but to no effect. They are absconders along with Mangru Shaw and Munilal Shaw. During inquiry all the seized properties were examined by an expert and the examination revealed that they were railway properties which were serviceable and were neither auctionable nor available in the open market. From the evidence collected during inquiry a prima facie charge has been well-established against all the seven accused persons namely Dhanbahadur Gurung, Rajaram Shaw, Chhotelal Shaw, Mangru Shaw, Munilal Shaw, Mohan Kumar Gurung and Munna Bahadur.

3. On the aforesaid allegations, one S. N. Dwibedi, SI/RPF/LCD submitted report before the Id. SDJM, Howrah, who took cognizance on that report.

401

482

4. Mr. Sudipto Moitro, the Id. Counsel appearing for the petitioners in both the cases (Criminal Revision 1123 of 1991 and Criminal Revision 1975 of 1994) contended that the complaint on the basis of which the impugned proceeding being Liluah LCD Post Case No. 1 (4) 1991 dated 24-4-91 under Section 3(a) of the Railway Property (Unlawful Possession) Act was registered, does not disclose any offence punishable under Section 3(a) of the Act against any of the petitioners and on that ground itself the proceeding is liable to be quashed. In support of this contention, Mr. Moitro relied on the Supreme Court decision in the case of State of Maharashtra v. Vishwanath reported in : 1979 CriLJ1193 and two unreported single Bench decisions of our High Court in Criminal Revision Case No. 7 of 1980: Purushottam Shaw v. Babur Ali Khan and Criminal Revision Case No. 1366 of 1983 : Purushottam Shaw v. State.

Mr. Moitro further contended that none of the petitioners can be legally linked up with the impugned proceeding inasmuch as the offence for which the case was registered on 24-4-91 was already complete on 24-4-91, the date of registration of the case, while the offence with which the petitioners could at all be connected was based on a recovery which was made on 3-5-91. The two offences, according to Mr. Moitro, are separate and distinct and cannot be linked up with one another in one and the same case.

5. Mr. Kazi Mohammed Ali, the Id. Counsel appearing for the Opposite Party No. 2, the complainant, on the other hand contended that the impugned proceeding is quite legal because it does disclose prima facie offences under Section 3(a) of the Railway Property (Unlawful Possession) Act against each of the petitioners and that the subsequent recovery dated 3-5-91 is so connected with the earlier recovery dated 24-4-91 as to form part of the same transaction and as such, there is no illegality in implicating the present petitioners in connexion with the case that

was registered on 24-4-91. Mr. Ali placed his reliance on three Supreme Court decisions reported in : 1992 CriLJ527 ; State of Haryana v. Bhajan Lal, : 1996 CriLJ381 ; Rupan Deol Bajaj v. Kanwar, Pal Singh Gill and : [1995]1SCR712 ; State of T.N. v. Thirukkural Perumal and submitted that this is not a fit case for exercising inherent powers of this Court under Section 482 Cr.P.C. in order to quash the impugned complaint.

6. On a plain reading of Section 3(a) of the Railway Property (Unlawful Possession) Act, it is clear that an offence under this section is committed by a person who is either found or is proved to have been in possession of any railway property which is reasonably suspected of having been stolen or unlawfully obtained and he fails to prove that the said property came into his possession lawfully.

7. In : 1979 CriLJ1193 (State of Maharashtra v. Vishwanath), it has been held that the gravamen of the offence under Section 3 of the Act is the possession of the property but it need not necessarily be a subsisting possession. If the accused was not found in possession of the railway property it was permissible for the prosecution to allege and prove that they had been in possession of that property at any point of time in order to attract the application of Section 3.

8. In the unreported case of Purushottam Shaw v. Babar Ali Khan in Criminal Revision No. 7 of 1980 decided on 31 -7-81 by Justice Amitava Dutta, as His Lordship then was, the facts recited are as follows.

A search was conducted in the shop cum godown of Purushottam Shaw and several items of railway properties were seized. One Ranjeet Sharma said to be the Supervisor of the shop cum godown was arrested. During inquiry, it came to light that Purushottam Shaw is the tenant of the land and Chanchal. Pathak is the owner of the seized articles, while Ranjeet Sharma is the Supervisor of the said shopcum godown. Chanchal Pathak produced a sale order in order to show that the seized articles were obtained by him lawfully but the expert opinion was obtained which showed that some of the articles were serviceable and later on the complainant believed that all these seized materials were not purchased from auction of the railways. It was submitted on behalf of the accused petitioners

Purushottam Shaw and Chanchal Pathak that the facts disclosed in the petition of complaint do not make, out any offence under Section 3(a) of Railway Property (Unlawful Possession) Act inasmuch as there is no allegation that any of the petitioners was in possession of the materials in question nor was there any allegation that the materials in question were believed or suspected to be stolen or unlawfully obtained. It was also submitted that in fact that Chanchal was the owner of the materials in question was not enough as ownership may or may not be accompanied with possession and there is no specific allegation that any of the petitioners was in possession of the articles in question. His Lordship held that there is no clear statement to show that any of the petitioners was in possession of the materials in question and that the suspected materials not having been specified in the complaint the mere statement that one of the petitioners was the owner is not enough. In such view of the matter, His Lordship was pleased to quash the proceeding.

9. In the other unreported case of Purushottam v. State in Criminal Revision No. 1366 of 1983, the facts recited are as follows.

The shop cum godown of Purushottam Shaw was searched and some properties said to be the railway properties were seized. At the time of search one Shyam Sundar Singhania was present at the place of search. On the assumption that Shyam Sundar, Chanchal Pathak and Purushottam Shaw carried on business in steel materials in the place searched as partners, the complaint was made against all the three persons. The plea of Shyam Sundar and Chanchal was that they were not partners of any business carried on at the place of search and the Id. Magistrate accepted their plea and discharged them. But the Id. Magistrate did not discharge Purushottam. It was contended on behalf of Purushottam before the High Court that in the search report there was no mention that Purushottam was present at the place of search or had any manner of possession in respect of the offending articles. It was also submitted that there is no indication in the search report as to how the complainant came to know that Purushottam was in possession of the shop cum godown searched. It was accordingly argued before the High Court that there was no material to indicate prima facie that Purushottam was in possession of the offending articles. On behalf of Purushottam, reliance

was placed on the earlier unreported decision in Criminal Revision No. 7 of 1980 as referred to above, while on behalf of the State, it was conceded that the arguments advanced on behalf of the petitioners were irresistible. None appeared on behalf of the complainant inspector of the Railway Protection Force and in such circumstances, Justice N. G. Chowdhury, as His Lordship then was, observed that he was convinced that there was no material before the Id. Magistrate showing prima facie that the petitioner was in possession of the offending articles and in such view of the matter, he set aside the order whereby the Ld. Magistrate refused to discharge the accused Purushottam.

10. It would be now worthwhile to refer to the guidelines that were formulated by the Supreme Court in the case of State of Haryana v. Bhajan Lal reported in : 1992 CriLJ527 as to when and under what circumstances the High Court's powers under Section 482, Cr.P.C. should be exercised in regard to a complaint or an FIR. One such circumstance would arise where the allegations made in the FIR or the complaint, even if, they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. We must not be oblivious of the fact that in enumerating the categories of cases where the powers of the High Court under Section 482 should be exercised for quashing of FIR or the complaint, the Supreme Court sounded a note of caution by saying that the said categories should be considered as illustrative and not exhaustive because it is not possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. The Supreme Court has very clearly made it clear that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases and that the Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint.

11. The Supreme Court re-affirmed this view in the other two cases cited on behalf of the Opposite Party No. 2 namely : [1995]1SCR712 State of T. N. v. Thirukkural Perumal and : 1996 CriLJ381 Rupan Deol Bajaj v. Kanwar Pal Singh Gill.

12. It is now time for us to ascertain from the allegations made in the petition of complaint as to whether it is a fit case to be quashed.

13. The impugned proceeding was registered on 24-4-1991 under Section 3(a) of the Railway Property (Unlawful Possession) Act following recovery of some railway properties from the immediate possession of one Dhan Bahadur Gurung when his two associates namely Munnabahadur and Mohan Kr. Gurung managed to flee away before they could be apprehended by the complainant. In the two criminal revision cases under consideration we are concerned with three accused petitioners namely Rajaram Shaw, Mungroo Shaw and Munnilal Shaw who have been implicated in the self-same proceeding. According to the complaint, none of the petitioners was concerned with the recovery of the railway property that was made on 24-4-1991. All of them are concerned with the subsequent recovery that is said to have been made on 3-5-1991 following a disclosure made by the accused Dhanbahadur Gurung during his interrogation while in custody. According to the complaint, the said Dhanbahadur Gurung made a statement to the effect that he used to sell stolen railway property to the shop cum godown of Rajaram of Lala Babu Shire Road, Belur. Following such disclosure, a search warrant was obtained by the complainant and on the strength of that search warrant, the shop cum godown of Rajaram at 11, Lala Babu Shire Road, Belur was searched on 3-5-1991 and this search led to the recovery of several properties which were subsequently found on examination by an expert to be the railway properties. At the time of this search and the consequent seizure, none of the three petitioners was present in the said shop cum godown. Only one Chottelal Shaw said to be the son of Rajaram Shaw was then present and was arrested from that godown. It is on the basis of the disclosure made by Dhanbahadur Gurung on 24-4-1991 and the evidence subsequently collected during the inquiry that the accused Rajaram Shaw has been implicated with the recovery that was made on 3-5-1991 and linked up with this case. So far as the other two petitioners are concerned, they have been implicated only on the basis of the said evidence which was subsequently collected during the inquiry. The evidence is that the Bally Municipality issued a memo stating that the municipal trade licence that was in force in relation to that particular shopcum godown at 11, Lalababu Shire Road, from where the recovery of another bunch of railway properties was made on the

strength of search warrant obtained from the Court, stood in the names of all the three petitioners. The fact that the three petitioners were the joint holders of the municipal trade licence in relation to the business that is being carried on in the shop cum godown at 11, Lalababu Shire Road prima facie indicates that they jointly carry on business in the said shop cum godown. It is true that none of them was actually found during the search recovery and the seizure' but then it would be permissible for the prosecution to prove that they had been in possession of the railway properties which were recovered during search of that shop cum godown on 3-5-1991. Now, Section 3(a) of the Railway Property (Unlawful Possession) Act is applicable not only when some body is in possession of the incriminating property but also when he is proved to have been in possession of such property at any point of time. The question of proof will arise only during the trial and that stage has not yet arrived. The complaint does disclose the fact that the properties which were seized from the actual physical possession of Dhanbahadur Gurung on 24-4-1991 and those seized from the shop cum godown of Rajaram Shaw and the other two petitioners on 3-5-1991 were all railway properties. It further indicates that those railway properties were all serviceable, not auctionable and were also not available in the open market. At paragraph 7 of the petition of complaint, it has been stated that on examination of seizure witnesses and collection of 'other evidences', a prima facie charge under Section 3(a) has been well established against the accused persons noted in serial No. 5 including the present petitioners. What the 'other evidences' are would come to light during the trial and the petition of complaint is not supposed to disclose them. As such, non-disclosure of what other evidences were collected would not be fatal to the prosecution at this stage. For the present, the complaint contains the allegation that it transpires from the statement of Dhanbahadur Gurung that he was in the habit of selling stolen railway properties to the shop cum godown from where the recovery dated 3-5-1991 was made on the basis of a search warrant. The allegation that the railway properties seized in this case were all serviceable and not auctionable and are also not available in the open market, according to the opinion given by the expert on examination of the properties concerned, is prima facie sufficient to warrant an inference that the railway properties in question can be said to have been reasonably suspected of having been stolen or at least

unlawfully obtained. The fact remains that no attempt has been made as yet on behalf of any of, the petitioners to prove or plead that the said railway property came into their possession lawfully. Of course, the stage for proving that the possession is lawful has not yet arrived.

14. The facts and circumstances under which their Lordships in the two unreported decisions cited by Mr. Moitro quashed the proceeding are, in my view, distinguishable from the facts and circumstances of the present case.

15. As the materials on record stand, they would, in my view, would prima facie indicate that all the petitioners had been in conscious possession of the railway properties at some point of time prior to their recovery during the search dated 3-5-1991. As such, having regard to the guidelines given by the Supreme Court in Bhajanlal's case (supra), I am afraid that the instant case cannot be considered to be the rarest of rare cases in which the powers of this Court under Section 482 should be exercised in quashing the impugned complaint. In such view of the matter, there is hardly any scope for quashing the impugned proceeding or setting aside the order that was passed by the Id. Magistrate for issuance of warrant of arrest against the petitioner, Rajaram Shaw.

16. I now come to the question of mis-joinder of charges which includes mis-joinder of offences as well as accused persons. The general rule is that there shall be a separate charge and every such charge shall be tried separately, except in certain specified cases referred to in Sections 219, 220, 221 and 223 of the Cr.P.C. Under Section 223(d) persons accused of different offences committed in the course of the same transaction may be charged and tried together. According to clause (e) of Section 223, persons accused of an offence which includes theft and persons accused of receiving or retaining or assisting in the disposal or concealment of property, possession of which is alleged to have been transferred by any such offence committed by the first named persons can also be charged and tried together. Here the property that was recovered on 3-5-1991 from the shop cum godown located at 11 Lalababu Shire Road, Belur is not alleged to be the property possession of which has been transferred by theft committed by Dhanbahadur Gurung. Accordingly, clause (e) of Section 223 would not be

applicable here. Even if it be assumed that the present petitioners and the accused Dhanbahadur Gurung against whom the present case was initially registered on 24-4-1991 committed different offences which are not connected with one another so as to form a part of the same transaction and the case is not covered by any of the clauses of Section 223, Cr. P. C, it will be a case of mis-joinder of charges. Misjoinder of charges is a procedural defect which would amount to an irregularity and not illegality so as to be curable under Section 464, if, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has, in fact, been occasioned thereby and there is still remaining scope for splitting up of the trial by the Magistrate in so far as it involves two different recoveries of railway properties. The trial has not begun and as such the question of mis-joinder of charges can be left open to be agitated before the Id. Magistrate.

17. In the circumstances, no intervention by this Court in the exercise of its jurisdiction under Section 482, Cr. P.C. need be made at this stage.

18. Before I conclude, I would like to place on record the submission that was made by Mr. Moitro in course of hearing that one of the petitioners of Criminal Revision No 1975 of 1994 namely Mangru Shaw has since died. If that be so, criminal prosecution can be said to have already abated as against him.

19. Thus, in view of my findings and observations recorded above, it would necessarily follow that the impugned proceeding is not liable to be quashed as against the petitioners, Rajaram Shaw and Munnial Shaw. In the result, both the revisional applications fail and are hereby dismissed. This judgment shall govern Criminal Revision No. 1123 of 1991 and Criminal Revision No. 1975 of 1994. Let the execution of the warrant of arrest which was issued against the petitioner Rajaram Shaw be stayed for 7 days more so as to enable the petitioner to surrender before the Court and pray for bail.