

ALL CARGO MOVERS (I) PVT. LTD. & ORS.

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v.

DHANESH BADARMAL JAIN AND ANR.

OCTOBER 12, 2007

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

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*Code of Criminal Procedure, 1973:*

*ss. 190 and 482—Exercise of power under—Dispute between parties arising out of a contract of carriage—Suit with regard to the said dispute pending before High Court—Criminal complaint filed alleging breach of trust—Magistrate issuing summons—Petition for quashing summons dismissed by High Court—HELD: Breach of contract simplicitor does not constitute an offence—Allegations in complaint petition must also disclose necessary ingredients of the offence—On facts, complaint petition does not disclose any averment with regard to ingredients of offences u/ss 406 and 420 IPC—Where during pendency of a civil suit, a criminal complaint is filed, court may, for ascertaining correctness of allegations, notice, besides the pleadings in the suit, correspondence exchanged between parties and other admitted documents—Criminal proceedings should not be encouraged when it is found to be malafide or otherwise an abuse of process of court—Superior Courts while exercising this power should strive to serve ends of justice—Impugned orders set aside—Penal Code, 1860—ss. 406 and 420—Administration of Criminal Justice.*

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**Respondent no. 1 entered into a contract of carriage with the appellant for delivery of certain consignments to a company, namely, 'UA', in Kenya. Appellant asked 'MN', its agent in Kenya, to arrange the delivery of the said consignments. The goods said to have been delivered by the agent or the appellant to the original consignee were allegedly rejected by the latter as being inferior in quality. The goods were then said to have been delivered to another company. Respondent no. 1 issued a notice to the appellant and**

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- A** others stating that they effected delivery of the consignments without production of original Bills of Lading and committed a breach of contract of carriage and acted in violation thereof. A suit was filed by respondent no. 1 in this regard in the Bombay High Court. More than a year thereafter, respondent no. 1 filed a criminal complaint
- B** against the appellants alleging commission of offence of criminal breach of trust by them for effecting delivery of consignments in connivance and causing criminal misappropriation of valuable property of the complainant. The accused filed a petition for quashing the order issuing summons to them, which was dismissed by the High
- C** Court observing that the allegations made in the complaint, prima facie, disclosed the offence of breach of trust. Aggrieved, the accused filed the instant appeal.

**Allowing the appeal, the Court**

- D** **HELD: 1.1. Breach of contract simplicitor does not constitute an offence: Allegations in the complaint petition must disclose the necessary ingredients of the offence. In the instant case, 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. A**
- E** **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.**

[Para 14 and 17] [279-B, C, D; 278-D]

- F** **1.2. Where a civil suit is pending and the complaint petition has been filed after filing of the civil suit, the Court may, for the purpose of finding out as to whether the said allegations are prima facie correct, notice the correspondences exchanged by the parties and other admitted documents. Further, the Court may not only take into consideration the admitted facts but may also look into the pleadings**
- G** **in the suit. No allegation whatsoever was made against the appellants in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent.**

[Para 17 and 18] [279-B, C, D]

- H** **1.3. Criminal proceedings should not be encouraged, when it is**

**found to be mala fide or otherwise an abuse of the process of court. Superior Courts while exercising this power should also strive to serve the ends of justice. The impugned judgment cannot be sustained and is set aside. [Para 17 and 22] [279-F; 281-E]**

*G. Sagar Suri & Anr. v. State of U.P. & Ors.*, [2000] 2 SCC 636; *Anil Mahajan v. Bhor Industries Ltd. & Anr.*, [2005] 10 SCC 228; *Hira Lal Hari Lal Bhagwati v. CBI, New Delhi*, [2003] 5 SCC 257; *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, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1443 of 2007.

From the Judgment and final Order dated 19.01.2007 of the High Court of Gujarat in Miscellaneous Criminal Application No. 3585 of 1998.

F.S. Nariman and Siddharth Luthra, Sanjiv Sen, R.N. Karanjawala, Nandini Gore, Pragya Singh Baghel, Simran Brar and Manik Karanjawala for the Appellant.

P.H. Parekh, Lalit Chauhan, Sumit Goel, Arjun Garg, Pallavi (for P.H. Parekh & Co.), Hemantika Wahi and Pinky for the Respondents.

The Judgment of the Court was delivered by

**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

A 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

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“That 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.”

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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 :

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“That 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.”

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

“PLEASE TREAT THIS AS OUR FORMAL CLAIM FOR A  
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.”

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

“The above shipments were released 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 C  
(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. D
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. E

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 F  
close of business today.

In the meantime we are holding all your shipments until this matter  
is resolved.”

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

“CC : All Cargo India, Mumbai.

Attn : Vevek Kele H

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

B 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.

C 10. In the said suit, the following have been arrayed as defendants :

D “1. 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.

E 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 -- 400001.

F 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.”

G 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 :

H “The respective ships carrying the said six consignments sailed from

the Port of Bombay on different dates and arrived at Mombassa. A  
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. B

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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 C  
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 D  
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 E  
wherein, inter alia, it was alleged :

“Thereafter in and subsequent to September, 1996, the complainant  
was shocked to learn that the accused have delivered away the  
goods materials of the complainant’s above described 6 F  
consignments without – 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 G  
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 H

A induced the complainant to believe that the complainant's goods –  
material delivered to the accused by the complainant would be  
delivered by the accused to the receiving party only "TO ORDER"  
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  
B 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  
C 420, 34 and 114 of I.P. Code."

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  
D 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.

E 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 :

F "Perusing 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  
G 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  
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relief on 1.9.1998. Therefore, petition is dismissed, Rule is A  
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 B  
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 C  
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 simplicitor does  
not constitute an offence. For the said purpose, allegations in the complaint D  
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 E  
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. F  
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 :

“8. Jurisdiction under Section 482 of the Code has to be exercised G  
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 H

- A 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
- B prevent abuse of the process of any court or otherwise to secure the ends of justice.

C 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. Bhor Industries Ltd. & Anr.*, [2005] 10 SCC 228, this Court held :

- D “8. The substance of the complaint is to be seen. Mere use of the expression “cheating” in the complaint is of no consequence. Except mention of the words “deceive” and “cheat” in the complaint filed before the Magistrate and “cheating” 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
- E 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
- F 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’s 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
- G these aspects is that a civil suit is pending inter se the parties for the amounts in question.”

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

- H “It 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.”

{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.

R.P.

Appeal allowed.