

Sharon Michael & Ors vs State Of Tamil Nadu & Anr on 19 December, 2008

Author: S.B. Sinha

Bench: Cyriac Joseph, S.B. Sinha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2089 OF 2008
(Arising out of SLP (Crl.) No.3600 of 2006)

Sharon Michael & Ors.

... Appellants

Versus

State of Tamil Nadu & Anr.

... Respondents

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Appellants are before us being aggrieved by and dissatisfied with the judgment and order dated 2.3.2006 passed by a learned Single of the High Court of Judicature at Madras in Criminal Appeal No.26498 of 2005 dismissing their applications for quashing the summons issued to them in Crime No.32 of 2005 on a complaint filed by one of the partners of M/s. Aarbee Apparels Impex, Tiruppur under Sections 120-B, 409 and 420 of the Indian Penal Code (for short, "IPC").

3. M/s. T.M.S. Fashion Private Limited, Chennai (for short, "the Company") is a certifying agent. Appellant No.1 is the Assistant General Manager of the company engaged in export of garments. Appellant No.2 is the Accounts Manager, Appellant No.3 is the Shipping Manager, Appellant No.4 is one of its Directors and Appellant No.5 is a Consultant for the Company. Appellant No.6 is an employee of Bax Global Private Ltd. who has nothing to do with the appellant company.

4. In the complaint petition, the complainant alleged that the appellant Nos.1 to 4 had approached the Aarbee Apparels Impex which is engaged in the manufacture of Hosiery Garments in the month

of December 2004 for supply of men's cardigan and sweat shirts for the total value of 76,197.60 Euros to Ultimate Buyers at Germany. Pursuant thereto or in furtherance of the said contract entered into by and between the parties, export of the said garments were made by Respondent No.2. The Company is said to have issued various inspection certificates in the following terms :

"This is to certify that the goods of above Order have been inspected prior to shipment and found in order and good conditions. This certificate shall be entirely without prejudice and shall not absolve the seller from liability in respect of any actions, claims, demand of proceedings subsequently taken or made by TMS (Fashion) Pvt. Ltd. and/or their customer."

The supplier company Aarbee apparel, however, stood guarantor for 'skip stitches after checking'.

5. The buyer company by an email refused to accept the shipment on the premise that on a random checking too many defects disqualifying the goods to be shipped were found and, thus, the goods being sub-standard, were not acceptable. They asked the company to pick up the goods from their warehouse. Respondent No.2, however, did not make any attempt to re-export the said goods from Germany to India.

On or about 18.3.2005, it filed a complaint petition with the Superintendent of Police, Coimbatore to help it to recover dues from the appellant company.

Appellant company, thereafter sent a legal notice to Respondent No.2 on or about 25.3.2005, inter alia, stating :

"Our clients state that you were clearly informed that quality control checks would be very stringent and unless quality norms are met, the buyer would not accept the consignment leading to large losses all around. You accepted the terms and promise to deliver the finished goods in time. Accordingly, three purchase orders were placed on you by TMS, details as follows :

	SP0 No.	Style No.	Rate ? PC
1.	051949	P30837	Euro.6.80 (C&F)
2.	7051961	P30857	Euro.9.45 (C&F)
3.	7051964	P30858	Euro10.26 (C&F)

The delivery date was stipulated as 15.01.2005, payment on L/C basis at sight. The letter of credit was accordingly established by Manhattan on you expiring on 25.01.2005 for the sum of 84.486.00 Euro you have accepted the purchase order and claimed to have commenced manufacture. Our clients state that within a few days, it was found that your factory was having only around 15 machines and worse, the factory itself as not running for a few months and you had given the entire order on job work basis to various smaller units in Tirupur. At that stage, our client had committed the delivery schedule to the buyer in Germany and also accepted heavy penalties in case of delayed delivery of short supply. Thus, there was no choice for our

clients to cancel the order with you and find another manufacturer. Further, rejection would be automatic and you were directed to ensure very strict quality checks and delivery schedules. You have assured TMS that despite the out sourcing of the work, quality and delivery schedule would not be an issue since you would personally see the order is carried out categorically.

Our clients state that despite these assurance, you could not stick to the schedule delivery date and ultimately, even the letter of credit opened on you by Manhattan expired. To our clients short and dismay, it was found that practically none out of the garment were defective. A Complete quality check was proving difficult because of your non- cooperation and finally TMS had to send its staff from Chennai to supervise the quality check by end January 2005. The order was coming into your factory from various jobbers in bits and much time the garment was checked, it could not be the checked garment factory since you did not even have an repeating apparently, many of the pieces rejected to TMS quality control staff were repeated and brought by you as if it had passed scrutiny. Ultimately by middle of February 2005, our client already threatened with huge penalties by the buyer due to delay, decided that 7.080 pieces would be shipped out on the understanding that you will receive payment only for those garments accepted by the buyer. The final inspection reports from TMS passed these items only under your letter of guarantee for the various defects pointed out in the reports. It is relevant that Order No.7051949 Styles P30837 totally rejected by TMS, Tirupur, since the fabric did not meet the specifications given in the purchase order.

Accordingly, the other shipments pertaining to Order No.7051961 & 7051964 left Chennai under Airway Bill Nos.020-34456435 dated 18.02.2005 and No.020-34456413 dated 19.02.2005 destination D|sseldorf, Germany. By e-mail dated 1.3.2005, the buyer Exprit, Germany have informed TMS, Channai that the entire consignment was rejected by them. Our client's enquiries with the buyer revealed that on random checking, it was found that practically every piece checked had some defect or the other and their stores could not retail such poor quality stock. Our clients have pleaded with the buyer to salvage at least those few pieces which they would feel acceptable qualitywise and that process is still underway. However, our clients have been informed clearly that there is no obligation on the part of the buyer to accept even a single garment since it is not their job to check each and every garment before accepting the goods. Such random checks are the accepted trade practice and failure to adhere to such strict quality norms has resulted in huge losses to our clients. Our clients state that in particular, TMS has lost commission amounting to 1882-90 Euros (Rs. One lac three thousand five hundred and sixty only) and Manhattan have been threatened by the buyer with a claim equal to five time the FOB value (Rs.2,58,90,000). In fact Manhattan have already received a debit note from the buyer for style P30857 for 52020.54 Euro. Further claims are expected any moment. Our clients state that you are directly responsible for these losses. You have deliberately made our clients risk their reputation in the

international market and you have exposed our clients to severe losses by your irresponsible and dishonest acts. You have deceived our clients into placing the order with you by falsely representing that you have the experience, infrastructure and means to carryout the order on top of all these you appear to have given some false complaint to the Crime Branch, Tirupur as if TMS has cheated you. You are hereby called upon to immediately withdraw this complaint which clearly amounts to malicious prosecution meant to harass our clients failing which our clients would take severe action against you. Our clients also hereby put you on notice that the consignment is lying at Germany and despite our clients repeated mails to you, you have neither bothered to respond and explain and rejection of the goods nor have you agreed to make arrangements to take back the consignment. Our clients have been informed by the buyer that they will not be responsible for the consignment after 10.4.2005. The warehousing and handling charges would have to be borne by you. Having guaranteed the quality of the consignment to the standards set by the buyer, you cannot today claim the value of the order from our clients and instead you are due to our clients the damage suffered by them by your non-performance. On behalf of our clients, we hereby call upon you to pay our clients a sum of Rs.28,61,130/- being the rupee equivalent of 52,020.54 Euro within 15 days of receipt of this notice, failing which our clients will institute appropriate legal action for the recovery thereof, needless to add at your costs and consequences. Further, be forewarned that further claims from the buyer to our client's account will be in turn claimed by our clients from you. This notice is issued without prejudice to our clients rights to you for malicious prosecution and damages on account of your complaint to the Police against our clients, if the need arises."

6. A first information report was lodged by respondent No.2 before the Coimbatore Police Station on or about 4.6.2005, inter alia, requesting the officer in charge of the Police Station to take legal action for the alleged offences committed by the appellants and help it to recover the amount from them. Thereupon Crime No. 32 of 2005 was registered.

It is not in dispute that after two employees of the appellant company were arrested, a sum of Rs.30,00,000/- (Rupees thirty lacs only) was paid by the appellant company to the respondent No.2. It is further stated that another sum of Rs.18,00,000/- (Rupees eighteen lacs only) is owing and due to them. It is at that stage, the appellants filed an application under Section 482 of the Code of Criminal Procedure.

By reason of the impugned judgment, while dismissing the said application, the High Court held:

"9. The facts and circumstances of this case would reveal that M/s. ESPRIT EUROPE TRADING AND PRODUCT DEVELOPMENT had approached the Manhattan Limited in Hong Kong to supply "men's cardigan and sweat shirts".

Manhattan Limited had contacted TMS fashions Pvt. Ltd. to procure those goods and supply them to Esprit Europe Trading and Product Development, based on the Letter of Credit opened by

Manhattan Limited, TMS Fashions Pvt. Ltd., approached M/s. Aarbee Exports Impex to produce "men's cardigan and sweat shirts" for export.

10. As far as the De facto complainant is concerned, the de facto complainant was not approached by M/s. Espirit Europe Trading and Product Development or Manhattan Ltd. TMS Fashions Pvt. Ltd. alone contacted the de facto complainant and persuaded them to manufacture the specified goods for export to Germany. The documents would show that quality check had been done by the TMS Fashions Pvt. Ltd. The whole production done by the d facto complainant was completely controlled by TMS Fashions Pvt. Ltd.

11. There is a specific allegation in the complaint that the de facto complaint refused to go in for shipment of the goods as they understood that the Letter of Credit opened by M/s. Manhattan Ltd. with State Bank of India, Tirupur Branch was not renewed on 25.1.2005. It has also been stated in the complaint that TMS Fashions Pvt. Ltd.

informed the de facto complainant that the Letter of Credit opened by Hong Kong Company was revalidated upto 28.2.2005, having consigned the goods, the de facto complainant approached the State Bank of India, Tirupur Branch but was unfortunately informed by the State Bank of India, Tirupur Branch that the Letter of Credit was never revalidated, it is further contended in the complaint. The allegations of criminal conspiracy and cheating have been made in the complaint." It was furthermore opined :

"16. In the instant case, it has been specifically contended in the complaint that the petitioners herein enticed the de facto complainant to part with the goods having made misrepresentation that the Letter of Credit opened by the Hong Kong Company was extended for a further period and thereby the accused de facto complainant was duped by the petitioners herein. Therefore, the above authority will not apply to the facts and circumstances of this case."

The High Court concluded:

"20. It is not as if that the complaint lacks ingredients of the offence of cheating and criminal breach of trust. The petitioners cannot wriggle out of the investigation process embarked upon by the second respondent-police on the ground that they acted as an agent of their principal M/s. Manhattan Ltd. The allegation in the complaint would reveal that the whole transaction was clinched by the de facto complainant only with the petitioner herein. But for the representation made and the assurance given by the petitioners, the goods would not have been shipped by the de facto complainant, it has been contended in the complaint. The whole gamut of the allegation will have to be probed into by the investigation agency. When the complaint reflects commission of cognizable offence and the same will have to be thoroughly investigated by the second respondent-police, the question of quashing the case registered against the petitioners does not arise for consideration."

7. Mr. G.V. Rao, learned counsel appearing on behalf of the appellant would contend that the dispute between the parties having arisen out of a contract qua contract, the complaint petition was not maintainable.

8. Mr. V. Kanagaraj, learned senior counsel appearing on behalf of Respondent No.2, on the other hand, submitted that the complaint petition had to be filed only because the appellant did not pay the entire amount representing the value of the garments exported. It was contended that the appellants having made part payment of the entire dues cannot be permitted now to turn round and contend that they have no liability in the matter at all.

9. Indisputably Respondent No.2 is the producer of the garments. The buyer is a German Company. Rightly or wrongly, the buyer refused to accept the goods, inter alia, on the premise that the same were defective and sub-standard. We will assume that the appellant company was assured payment for such supplies. Even if that be so, it would be a del credere agent. Its liability is, therefore, a civil liability. The allegations contained in the First Information Report did not reveal that any misrepresentation was made at the time of formation of the contract. The goods were to be supplied by Respondent No.2. They were presumably required to meet the requirements of the buyer. Even if the certificate granted by the appellant company was incorrect, an appropriate action against them could have been taken for breach of contract.

10. The ingredients of an offence as contained in Section 420 of IPC are as under:

- "i) Deception of any persons;
- ii) Fraudulently or dishonestly inducing any person to deliver any property; or
- iii) to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."

Criminal breach of trust is defined in Section 405 of IPC. The ingredients of an offence of the criminal breach of trust are :

- "1. Entrusting any person with property or with any dominion over property.
- 2. That person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation--
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or
 - (ii) of any legal contract made touching the discharge of such trust."

Ingredients of Section 409 of IPC read as under :

"(i) The accused must be a public servant;

(ii) He must have been entrusted, in such capacity, with property.

(iii) He must have committed breach of trust in respect of such property."

11. The First Information Report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract.

No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant-company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the company.

12. In *R. Kalyani v. Janak C. Mehta & Ors.* [2008 (14) SCALE 85], this Court held :

"24. As there had never been any interaction between the appellant and them, the question of any representation which is one of the main ingredients for constituting an offence of cheating, as contained in Section 415 of the Indian Penal Code, did not and could not arise.

25. Similarly, it has not been alleged that they were entrusted with or otherwise had dominion over the property of the appellant or they have committed any criminal breach of trust. So far as allegations in regard to commission of the offence of forgery are concerned, the same had been made only against the respondent No. 3 and not against the respondent No. 2. Sending a copy thereof to the National Stock Exchange without there being anything further to show that the respondent No. 2 had any knowledge of the fact that the same was a forged and fabricated document cannot constitute offence. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in- charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

It was furthermore observed:-

"27. If a person, thus, has to be proceeded with as being variously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the Company as well as the person responsible for the acts of the Company."

The liability of the company is, therefore, a civil liability. It is also not a case where although a prima facie case had been made out disclosing commission of an offence, the court is called upon to consider the defence of the accused. The First Information Report itself refers to the documents. They can, therefore, be taken into consideration for the purpose of ascertaining as to whether the allegations made in the complaint petition read as a whole, even if taken to be correct in its entirety, discloses commission of any cognizable offence or not. As admittedly Respondent No.2 was the supplier of garments which were found out to be defective in nature, we are of the opinion that the dispute between the parties is civil in nature.

13. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The impugned summons issued to the appellants are quashed.

.....J. [S.B. Sinha]J. [Cyriac Joseph] New Delhi;

December 19, 2008