Velji Raghavji Patel

Vs

State of Maharashtra

Criminal Appeal No. 43 of 1963

(Raghuvar Dayal, J. R. Mudholkar JJ)

11.12.1964

JUDGMENT

MUDHOLKAR J. -

In this appeal from the judgment of the Bombay High Court the question which falls to be considered is whether a partner can be convicted under section 409, Indian Penal Code on the ground that his failure to account for monies belonging to the firm in which he was a partner amounts to criminal breach of trust.

The admitted facts are briefly these :

The firm, Messrs. Bharat Silp Pramandal, which was formed for carrying on the business of building construction, originally conisted of eight partners and the appellant was its working partner. This firm was constituted in the year 1954. But on February 6, 1957 three of the partners retired and the business was continued by the remaining five partners. Disputes arose amongst them, which were referred to arbitration of Mr. J. T. Desai, a Solicitor. Apparently, in pursuance of his award a fresh agreement (Ex. N) was entered into by the partners on June 4, 1958. By virtue of this agreement the appellant's share in the firm's business was to be of 50 nP. in a rupee while the other partners had different shares in the remaining 50 nP. Nagindas Jivraj Mehta, who is the complainant in this case had a share to the extent of 6 nP. Under this agreement the parties decided not to undertake new work. The agreement required the appellant to complete all the accounts and prohibited from borrowing money in the name of the firm. It required him "to use his best efforts to realise all pending bills, security deposits, claims etc." as well as to dispose of the plant, machinery etc. The agreement also provided that partners, other than the appellant, would procure, if the need arose, further finance to the maximum limit of Rs. 25,000/- but that if a sum in excess of this amount was required, that excess was to be brought in by all the partners including the appellant "individually pro rata in proportion to their shares of profits and losses in the firm". Clause 8 of this agreement permitted the appellant to withdraw on his own account a sum of Rs. 10,000 "no sooner he is able to realise any of the pending claims of bills of the firm or security deposits". We have dealt with this agreement at some length because it will be relevant to consider these matters in the context of the argument of Mr. Rana to the effect that the appellant as working partner was entitled to utilise the realizations made by him for carrying on the work of the firm.

According to the complainant the appellant committed misappropriation to the tune of Rs. 8,905/- consisting of the following six items :

Rs. 2,871/- 3,000/- 1,100/- 1,100/- 750/- 84/- ---------- TOTAL 8,905/- ----------##

The trial court acquitted the appellant with respect to the last two items but convicted him in respect of the first four items.

The appellant admits that he realised these four items but he says that he did so in his capacity as partner and he utilised them for the business of the partnership. Therefore, according to him, he is only liable to render accounts to his partners and cannot in any circumstances be said to be guilty of an offence under section 409, I.P.C. He also points out that the complainant has instituted a suit for the dissolution of the partnership and for rendition of accounts and that he instituted the present complaint solely with the idea of making it difficult, if not impossible, for the appellant to defend the civil suit properly.

On behalf of the appellant it is contended that even if the prosecution had succeeded in showing that the four items referred to above were realised by the appellant and that he has not accounted for them properly he will not be liable for criminal breach of trust under section 409, I.P.C. but that this liability would be only of a civil nature. In support of this contention reliance is placed upon Bhuban Mohan Rana v. Surendra Mohan Das (I.L.R. (1952) II Cal. 23.). There the following question was referred for decision by the Full Bench :

> "Can a charge under section 406 of the Indian Penal Code be framed against a person, who, according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners ?"

All the five Judges constituting the Full Bench answered the question in the negative. In the leading judgment which was delivered by Harris C.J., he pointed out that before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property and that a partner does not, in the ordinary course, hold property in a fiduciary capacity. The learned Chief Justice further pointed out that there is really no distinct or defined share of a partner in any item belonging to the partnership. Upon the dissolution of the partnership and after an account is taken it may turn out that a partner who retains an asset is entitled to the whole of the asset and may be, much more. He referred to the English view that a partner does not hold money belonging to the partnership in a fiduciary capacity and said that this view appeared to him to be correct. Referring to the decision in The Queen v. Okhoy Coomar Shaw (13 Bengal Law Reports 307.) in which a Full Bench had held that a partner who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted or over which he has dominion, is guilty of an offence under section 405, I.P.C., Harris C.J. observed :

> "The Full Bench never seems to have considered that there is really no partner's share in the property until an account (sic) and it may well bee that a partner, who retains an asset, is entitled not only to his share according to the partnership agreement in that asset, but, on taking an account, it may be found that he is entitled to the whole of the asset and considerably more. In such a case, how can it be said that he has been guilty of a breach of trust and has acted dishonestly towards his co-partners, if an accounts would show that he was entitled to everything which he had retained ?"

He has referred to a number of decisions of the Indian High Courts in some of which the view taken in Okoy Coomar Shaw's case (13 Bengal Law Reports 307.) was followed. One of those cases was Jagannath Raghunathdas v. Emperor (A.I.R. 1932 Bom. 47.) where it was held that a partner may be prosecuted under section 406, I.P.C. for failure to account for partnership monies and assets. In that

case the partner who was the accused was given authority by the other partners to collect monies or property and according to the Bombay High Court in these circumstances he was "entrusted" with dominion over collections made by him. The learned Judges who decided that case had, however, pointed out that the court should approach cases of this kind very carefully because it was impossible to say in many cases what the share of the accused might be, whether the accused was indebted to the firm or whether the firm was indebted to him. The High Court also pointed out that if the firm was indebted to him there might be no dishonest intention in his dealing with the partnership property. In the arguments before us, apart from these three decisions, our attention was called to a few more decisions of the High Courts in India. But whether they take one view or the other they do not seek to add to what has been said in these three decisions. We, therefore, do not feel called upon to make any reference to these decisions.

It seems to us that the view taken in Bhuban Mohan Rana's case (I.L.R. 1962 11 Cal. 23.) by the later Full Bench of the Calcutta High Court is the right one. Upon the plain reading of section 405, I.P.C. it is obvious that before a person can be said to have committed criminal breach of trust it must be established that he was either entrusted with or entrusted with dominion over property which he is said to have converted to his own use or disposed of in violation of any direction of law etc. Every partner has dominion over property by reason of the fact that he is a partner. This is a kind of dominion which every owner of property has over his property. But it is not dominion of this kind which satisfies the requirements of section 405. In order to establish "entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. Therefore, as rightly pointed out by Harris C.J., the prosecution must establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused person. If in the absence of such a special agreement a partner received money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or in other words cannot be held to have been "entrusted" with dominion over partnership properties.

Mr. Chatterjee who appears for the respondent sought to show that there was special agreement in this case. According to him, by virtue of certain decisions taken at a meeting of the partners held on January 7, 1959 the appellant had been entrusted with the duty of making recoveries of monies from the debtors of the firm and, therefore, this was a case of specific entrustment.

All that he could point out was item No. 15 in the minutes of that meeting which runs thus :

> "Shri Veljibhai agrees to recover the monies due by Shri Kablasingh immediately and shall deposit the same with the Bankers of the firm."

He has, however, not been able to explain the next item in the minutes, the relevant portion of which runs thus :

> "(16) If in future any further moneys are required to be spent the same shall be spent out of the recoveries of the firm and no partner shall be bound or responsible to bring in any further moneys....."

Reading the two together the meaning seems to be only this that as working partner the appellant should carry on the work of recovery of the dues of the partnership and that in respect of the dues from one Kablasingh it was decided that they should be deposited in the bank. It does not follow this that any of the other partners was precluded from making the recoveries. Further, even if this is

said to be a mandate to the appellant item 16 authorities him to spend the money for the business of the partnership. That is to say, if the money was required for the business of the partnership it was not obligatory upon the appellant to deposit it in the bank. In our opinion, therefore, the appellant cannot be said to have been guilty of criminal breach of trust even with respect to the dues realised by him from Kablasingh and in not depositing them in the bank as alleged by the prosecution.

Mr. Chatterjee finally contends that the act of the appellant will at least amount to dishonest misappropriation of property even though it may not amount to criminal breach of trust and, therefore, his conviction could be altered from one under section 409 to that under section 403. Section 403 runs thus :

> "Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

It is obvious that an owner of property, in whichever way he uses his property and with whatever intention will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. As already stated, a partner has, undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation. Mr. Chatterjee's alternative contention must be rejected.

In the result we allow the appeal and set aside the conviction and sentence passed against him.

Appeal allowed.

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