Shivnarayan Laxminarayan Joshi and Others

Vs

State of Maharashtra

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Vs

Loonkaran Hansraj and Others

Criminal Appeals Nos. 179 of 1972

(Syed M. Fazal Ali, A.P. Sen JJ)

10.10.1979

JUDGMENT

FAZAL ALI, J. –

1. These appeals by special leave are directed against the judgment of the Bombay High Court by which the conviction and sentence of the appellants under Section 120-B, 477-A and 409 of the Indian Penal Code were upheld or modified to some extent. So far as appellant 1 is concerned, who was also accused 1 at the trial, his appeal is limited to the question of sentence as also the nature of the offence. The special leave granted to A-24 is open. Since all these appeals were decided by the High Court by one judgment we also propose to dispose of the appeals by one common judgment. The facts of the case have been detailed in the judgment of the courts below and it is not necessary for us to repeat the same over and over again.

2. We have heard learned counsel for both the parties at length and have also gone through the judgment of the High Court and that of the Sessions Judge and have also gone through the record f the case. On a perusal of the record and judgment of the High Court we are clearly of the opinion that these appeals are concluded by findings of facts. It is well settled that this Court in special leave will not interfere with concurrent findings of facts unless the findings are vitiated by a grave error of law or by an error which leads to serious and substantial miscarriage of justice. After a perusal of the judgment of the courts below we find ourselves in complete agreement with the view taken by the High Court and the unable to find any special circumstances which require our interference with the order passed by the High Court.

3. A number of contentions were raised by the counsel for the various accused and after considering those contentions we find that they have been fully met by High Court in its very well reasoned judgment which has considered various shades, aspects and points in controversy.

4. So far as appellant 1 (accused 1) is concerned Mr. Chitale who has argued the case with his usual ingenuity and persuasiveness submitted three points before us. It was argued that the appellant 1 had resigned from the office of the managing director of bank and therefore he could not be held liable for misappropriation committed after he had relinquished his office. So far as this is concerned, it

has been clearly found by the High Court that even though he acted as Chairman of the bank and had relinquished the office as managing director, he was for all practical purposes functioning as managing director of the Laxmi Bank throughout the material period. This finding is based on a thorough analysis and consideration of the evidence adduced before the court. In view of this finding it is manifest that even though the first appellant may have relinquished his office as managing director still he had full control over the affairs of the bank and virtually acted as de facto managing director. For these reasons, therefore, the first contention raised by Mr. Chitale must be overruled.

5. Secondly, it was contended that substitution of one chose action for another will not amount to a breach of trust or conversion to his own use by the accused. In R. K. Dalmia v. Delhi Administration ((1963) 1 SCR 253 : AIR 1962 SC 1821 : (1962) 32 Com Cas 699) this Court while relying on authorities of the Lahore court and other courts has clearly found that a director is not only an agent but is in the position of trustee. This has been held in People Bank v. Harkishan Lal (AIR 1936 Lah 408, 409) which was approved by this court. In this connection this Court observed as follows :

> Both Dalmia and Chokhani therefore had dominion over the funds of the Insurance Company. ((1963) 1 SCR 253 : AIR 1962 SC 1821 : (1962) 32 Com Cas 699)

6. In Peoples Bank v. Harkishan Lal (AIR 1936 Lah 408, 409) it was stated :

> Lala Harkishan Lal as Chairman is a trustee of all the moneys of the Bank.

7. In Palmer's COMPANY LAW, 20th Edn., it is stated at 517 :

> Director are not only agents but they are in some sense and to some extent trustees or in the position of trustees.

8. Similarly this Court pointed out that in case of G. E. R. & Co. v. Turner (LR (1872) 8 Ch App 149, 152) Lord Selborne observed :

> The directors are the mere trustees or agents of the company, trustees of the company money and property-agents in the transaction which they enter into on behalf of the company.

9. The same view was taken in Re Forest of Dean wherein in Sir George Jessel observed as follows :

> Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control.

10. This Court while approving the cases mentioned above observed as follows :

> We are, therefore, of opinion that Dalmia and Chokhani were entrusted with the dominion over the funds of the Bharat Insurance Company in the Banks. ((1963) 1 SCR 253 : AIR 1962 SC 1821 : (1962) 32 Com Cas 699)

11. Thus, this Court fully approved the law laid down by the cases mentioned above that a director was clearly in the position of a trustee and being a trustee of the assets which has come into his hand he had dominion and control over the same. A clear finding to this effect has also been given by the

High Court at page 33 of the judgment where the High Court has observed as follows :

> The property being an actionable claim against Rekhchand Gopaldas, accused 1 as the managing director was entrusted with complete dominion over the right to recover the same under the said articles and as such he was capable of committing dishonest misappropriation or conversion of that actionable claim. The finding of the learned trial Judge on the point of entrustment, therefore, has to be upheld and we confirm the same.

12. In R. K. Dalmia case ((1963) 1 SCR 253 : AIR 1962 SC 1821 : (1962) 32 Com Cas 699) referred above this court has held at page 279 that the word 'Property' is wide enough to include a chose in action.

13. Thus the appellant could succeed only if he could show that in lieu of chose in action which was property he had substituted securities of equal amount. In the instant case it has been found by the courts below that under rollings of hundis no payments were made. On the other hand the appellant through his agents caused false cash credit and debit entries made under the cover of which appellant 1 along with his lieutenants misappropriated the amounts. Even as regards the equitable mortgages the High Court has found that they also without any value and most of them had been sold out. In these circumstances the second point also does not appear to be tenable at all.

14. It was also urged that there is no evidence or finding that the appellant 1 had dominion over the properties misappropriated. On this point also the High Court has also clearly found that the appellant as managing director had sufficient dominion and control over the property and through the conspiracy hatched by him with his conspirators he was able to misappropriate a sum of Rs. 43.95 lakhs and thus deprived most of the depositors of the bank of the moneys which they had deposited with Laxmi Bank. It is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design which has been amply proved by the prosecution as found as a fact by the High Court.

15. In the instant case, the conspiracy to misappropriate was executed with such ingenuity, dexterity and adroitness that even the inspectors of the Reserve Bank could not detect the irregularities and false entries at first inspection of the accounts which was later found out by a thorough examination of the false entries made in the Akola Branch and other branches of the bank in the mofussil. The High Court has dealt with these aspects at great length and we agree with the findings arrived at by the High Court on this aspect also.

16. Lastly, it was argued by Mr. Chitale that so far as the question of sentence is concerned it merits consideration because the huge amount of Rs. two lakhs will have to be paid by the heirs. This argument merits consideration. It appears that after the judgment of the High Court and during the pendency of the appeal that after the judgment of the High Court and during the pendency of the appeal the appellant 1 died and therefore enhancement of fine of Rs. one lakh given by High Court would have to be paid by the heirs of the deceased, appellant 1. We find that there is some substance in this contention. Having regard to the peculiar facts and circumstances of this case we do not want to penalise the heirs of appellant 1 for the sin committed by appellant 1. In these circumstances we would also modify the direction of the High Court that out of the fine Rs. 50,000 will go to the government. We direct that out of the fine, if realised, the entire amount should be paid to the

official liquidator who would distribute the amount reteably amongst the depositors of the bank who have filed their claims, excluding the heirs of appellant 1. With this modification the appeal of appellant 1 is dismissed.

17. As regards appellants 2 to 4 Mr. Lalit confined his argument on the question of sentence and did not press the appeal on the nature of the offence committed by them. It was submitted that appellants 2 and 3 are of 85 and 75 years of age respectively and are not keeping good health as would appear from the medical certificate filed by the counsel. It was also state that so far as appellants 2 and 3 are concerned they were merely Muneems and were carrying out orders of appellant 1. The High Court has, however, found that so far as accused 2, 3 and 4 were concerned they were original conspirators who had assisted and abetted appellant 1 in his attempt to misappropriate the amount. Thus, we do not find sufficient ground for reducing the sentence. It was further argued that appellants 2, 3 and 4 have practically served out about a year, and after a lapse of 8 years it would be desirable to sent them back to jail. While considering the question of sentence the court has to bear in mind the gravity of the offence also which has its impact on the public and particularly the person who are deprived of their deposits. In these circumstances, therefore, we do not see any reason to reduce the sentences of any of these appellants. If these appellants are not keeping good health the Jail Superintendent would naturally take care of them and get them properly treated in the Jail Hospital and if any specialist is needed his service may also be requisitioned. For these reasons we, therefore, dismiss the appeal of appellants 2 to 4 without any modification in the sentence.

18. Lastly, we come to the case of appellant 24. The learned counsel appearing for him submitted that there was no legal evidence on the record to show that this appellant had any knowledge about the conspiracy but it was contended that he had, in fact, tried to improve the affairs of the bank. This aspect of the matter has been fully considered by the High Court at page 158 of the paper book and after considering number of circumstances the High Court found as follows :

> In fact, the material discussed above squarely brings some knowledge of these two things to accused 24. It is equally clear that after having acquired such knowledge within the first few months of his taking over as the General Manager, he has allowed the concealment of each initial shortage right throughout his regime as such General Manager and thereby helped the object of conspiracy being carried out.

19. In these circumstances, therefore, we are unable to accept the contention put forward by appellant 24. We may point out that under the principle contained in Section 10 of the Evidence Act, once a conspiracy to commit an illegal act is proved, act of one, conspirator becomes the act of the other. This principle clearly applies to appellant 24 once the knowledge of the conspiracy is proved as found by the High Court which observes as follows :

> The material on record, therefore, clearly shows that he was a party to the conspiracy and had jointed and participated therein by helping the other conspirators in getting the initial shortage of 1948 concealed in the several branches of Laxmi Bank; in other words, though not one of the original conspirators, he could be said to be one of the principal members of the conspiracy as suggested by the prosecution.

20. Similarly, some other subsidiary contentions have been raised which have been fully dealt with by the High Court and it is not necessary for us to repeat them.

21. It was also urged that this appellant entered on the scene in 1952 after the misappropriation was almost complete and hence he could not be a member of the conspiracy nor could he have any knowledge of the shortage found in the Akola Branch or other branches of the bank in the mofussil. Reliance we placed in this connection on Ex. 2006 to prove the bona fides of this appellant. The High Court has dealt with this aspect fully and found that after entering in his office, he joined the conspiracy and committed overt acts in furtherance of the said conspiracy. The case of the appellant that he hand sent instructions regarding heavy cash balances found in the bank in the mofussil, to be sent to Bombay Branch had not been proved. In fact, no suggestion to this effect was made to PW Bhattacharya, who proved Ex. 2006, and who deposed that the appellant was fully aware of the aforesaid shortage. The High Court after an exhaustive consideration of the facts and circumstances found as follows :

> Further, obviously he must have noticed apparently heavy cash balances lying in Akola Branch as well as in other branches and in the context of borrowing that was being done by the Laxmi Bank for the purpose of its daily requirement he could easily realise that these heavy cash balances must be unreal and in fact there were shortages of cash. Cash books disclosing large or heavy cash balances and not continuous borrowing by Laxmi Bank for daily requirements - these two features could have no other meaning but that heavy cash balances were not real and included shortages ... The theoretical explanation may sound plausible but in the facts and circumstances obtaining in the Laxmi Bank, it seems to us clear that after knowing these two features it is difficult to accept accused 24's statement that he continued to believe that the heavy cash balances as disclosed by the cash books were real.

22. In view of the detailed discussions of all the evidence and circumstances by the two courts below, we are unable to find any grave error of law so as to vitiate the findings of the High Court and call for our interference. For all these reasons, therefore, all the appeals are dismissed with the modification in case of appellant 1 as indicated above. The bail of appellants 2, 3, 4 and 24 are cancelled and they will now surrender and serve out the remaining portion of the sentence.

23. As regards the appeal against acquittal filed by the State with regard to the other accused persons who are acquitted by the High Court we do not find any substance in this appeal because the High Court has clearly fond that they had no clear knowledge of the conspiracy and even the approver has made number of inconsistent statements regarding participation of the acquitted respondents in the conspiracy. For these reasons, we fully agree with the order of the High Court acquitting respondents. The appeal filed by the tate is also therefore dismissed.

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