

(2004) 04 MAD CK 0017

In the Madras High Court

Case No : Criminal Original Petition No's. 4613 and 2723 of 2004 and Criminal M.P. No's. 1369 and 2192 of 2004

Janak C. Mehta, Jayesh R. Patel and L.K.P. Shares and Securities Ltd.

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 29-04-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 245, 482
Penal Code, 1860 (IPC) — Section 120B, 34, 406, 409, 420

Citation : (2004) 04 MAD CK 0017

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : B. Sriramulu, S.C. for K.P. Ananthakrishnan and K.M. Sriram, for the Appellant; Abudu Kumar Rajarathinam, Government Advocate and Sivam Sivanandaraj, for A-3, for the Respondent

Judgement

S. Ashok Kumar, J.—Criminal O.P.No.4613 of 2004 has been filed u/s 482 Cr. P.C., to quash the case in X Crime No.5 of 2003 on the file of the respondent.

2. The brief facts of the case are as follows:-

The first petitioner/A1, President of N/s. L.K.P. Shares and Securities Ltd., The second petitioner/A2 is the Branch Coordinator of the above said

companies. The company deals in buying and selling of shares among other business and have branches all over India. The first and second

accused work in the Head Office of the Company at Mumbai. Every branch is independent entity and has its own manager. Who is responsible for

the day-to-day business of the branch. The first and second accused rarely used to visit the Chennai branch. The third accused was the Manager

of the Chennai branch. The third accused was totally in charge and responsible for the day-to-day affairs of the branch. The auditors of the

company who audit the accounts regularly prepare their accounts based on the inputs given by the branch head/A3.

3. One Kalyani who is impleaded as intervener, lodged a complaint with the respondent alleging that she was having Account No.K-4 with LKP

Shares and Securities for the purpose of trading in shares on the National Stock Exchange. At the end of the year 2000, there was a credit balance

of Rs.9.57 lakhs in the her account and also shares worth Rs.11.97 lakhs were not delivered by LKP Shares and Securities. She also opened an

account with LKP Shares and Securities during February 2000 in the name of Sri RSR Securities Pvt. Ltd., for the purpose of trading in shares, in

account No R-14. The third accused by name Rajagopal operated the account maintained in the name of RSR Securities Pvt. Ltd., without the

complainant's (Kalyani) knowledge or consent and there exists a debit balance of Rs.21.08 lakhs in the said account No.R14 of RSR Securities

Pvt., Ltd., Thereafter the complainant-Kalyani and her husband stepped down as Directors of RSR Securities Pvt. Ltd., and Rajagopal and the

complainant's brother one Mr. Sridhar took charge as Directors of RSR Securities Pvt. Ltd., It is alleged that Rajagopal promised to take over

liability of RSR Securities Pvt., Ltd., being the aforesaid debit balance. But, Rajagopal failed to pay the amount of Rs.9.57 lakhs being credit

balance in the account of the complainant, (Account No.K.4) and also Rs.11.97 lakhs, being the value of the undelivered shares.

4. With the above allegations, a private complaint was filed before the Additional Chief Metropolitan Magistrate, Egmore, Chennai which was

referred to under Sec. 156(3) Cr.P.C., to the Central Crime Branch, Chennai and FIR in X Cr.No.5 of 2003 was registered for alleged offences

under Sections 406, 420, 468 read with 34 I.P.C., against the petitioners and one Rajagopal.

5. In CrI. O.P. No: 2723 of 2004, it is alleged that on behalf of the L.K.P. Shares and Securities Ltd., Rajesh Dikshit, Vice President of the

company also filed a complaint before the Central Crime Branch, Egmore which was registered as a case in X Crime No.928 of 2002 for alleged

offences under sections 120B, 406 and 420 IPC, in which the A3-Rajagopal, Kalyani, her husband, her brother and relatives, in all 7 persons

were made as accused and the allegations in the said complaint is that the seven persons mentioned as accused opened accounts on various dates

during the years 1999-2000 and have been operating the accounts. The accounts were opened only for the purpose of taking the profits arising out

of the purchase and sale of shares. At present except for the account of Kalyani, all other carry debit balance running into lakhs of rupees. This is

only due to the loss they have incurred during their trading in shares. But the accused have refused to pay any money to the company. In the

company of Kalayani, the accounts were operated by Rajagopal who was a partner in her company and the company has incurred a loss of 40

lakhs out of the calculated transactions which was executed by the seven accused in this case.

6. It is also alleged that the accounts of A. Sridhar, D. Dinesh, Mrs. Dhanam, Ms.R. Kalyani, S. Jayamani and M/s. R.S.R. Securiteis Ltd., are

interrelated. Rajagopal who was the Manager of the Chennai Branch of L.K.P. Shares and Securities Ltd., impressed upon the auditors of the

Company that the above mentioned accounts are group accounts and the balance for these accounts ought to be taken as a whole and shares of

these accounts were transferred to his own and to the people of his choice, which has resulted in loss and because of which the company sustained

a heavy loss.

7. The point for consideration is Whether the complaint against the petitioners should be quashed?

8. A perusal of the complaint would show that the address of the petitioners is not mentioned except that the first petitioner, President of LKP

Shares and Securities Ltd., and the second petitioner belong to LKP Shares and Securities Ltd., and there is no denial that they are residing at

Mumbai working in the Head Office.

9. LKP Shares and Securities Ltd., has got branches all over the country and A-3, Rajagopal is the Manager of the Chennai Branch who is in

charge of day-to-day affairs of the company. The said company is trading in shares. The complainant Kalyani is having an Account No. K.4 in the

said LKP Shares and Securities Ltd., and at the end of the year 2000 according to her she had credit balance of Rs.9.75 lakhs and also shares

worth 11.97 lakhs which are not delivered by LKP Shares and Securities Ltd., and

hence she lodged the complaint. A counter complaint was also lodged by the company alleging that the said Kalyani, her brother Sridhar, her family friend Rajagopal, A-3, and Mrs. Dhanam, sister of the said Rajagopal had accounts in LKP Shares and Securities Ltd., and Kalyani and her brother Sridhar had a separate company viz., RSR Securities Pvt., Ltd., which had Account No.R14 in the LKP Shares and Securities Ltd., and thereafter the complainant's brother Sridhar and A-3, Rajagopal became Directors of RSR Securities Ltd., One Dinesh who is brother-in-law of A-3, Rajagopal and Dhanam's husband also had accounts in LKP Shares and Securities Ltd., A free hand was given to A-3 Rajagopal to operate the accounts of RSR Securities Pvt. Ltd., and the operations of the accounts of A. Sridhar, D. Dinesh, Dhanam, Kalyani, Jayamani and RSR Securities Ltd., resulted in loss of 40 lakhs to LKP Shares and Securities Ltd., and the amounts are still due from them.

10. The case of the complainant Kalyani is that there was a credit balance of Rs.9.57 lakhs in her account in LKP Shares and Securities Ltd., and the same was not paid and shares worth about 11.97 lakhs were not delivered to her. But a perusal of the documents would show that the six accounts of Sridhar, Dinesh, Dhanam, Kalyani, Jayamani and RSR Securities Pvt. Ltd., including the two accounts of K-4 and R-14 in the name of the complainant and RSR Securities respectively, which are subject matter of the complaint, were being operated and controlled by the complainant's brother Sridhar and close family friend A3-Rajagopal. In fact A-3 Rajagopal Manager of LKP Shares and Securities advised the company to treat these accounts as group account. The same branch Manager A3-Rajagopal obtained a letter from the complainant authorising transfer of the credit balance in Account No. K-4 to be adjusted against debit balance in Account No. R-14. But the fact is that there was actually no credit balance in Account No.K-4 maintained by the complainant. On the other hand the complainant had a debit balance of Rs.13.28 lakhs.

11. A reading of the complaint lodged by the complainant would show that she disowned other accounts wherever there was debit balance. Profit from sale of shares of other accounts were transferred to the complainant's account to make it appear that there was credit of 9.57 lakhs as alleged in the account of the complainant.

12. When the group account of the complainant, her relatives and friends resulted in a loss of Rs.45 lakhs, according to the petitioners the complainant had started disowning the other group accounts having debit balance and started claiming only the amount of credit balance which arose from other accounts' transfers. A perusal of the records and materials available on record clearly show that there was no intention of cheating on the part of the first and second petitioners who are not in-charge of the day-to-day affairs of the Chennai Branch.

13. In Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, , in a similar situation, the Supreme Court held as follows:-

Even assuming prima facie all the allegations in the complaint to be true they merely amount to a breach of contract and could not give rise to criminal prosecution. There was nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with the money nor did the complaint indicate that the respondents had induced the appellant to pay them the amount parted with. The appellant also did not allege the respondents making any representation to him for parting with the money. Mere fact that they did not abide by their commitment as to starting of the business in complainant's name as agreed to would not fasten them with criminal liability.

14. As far as the complainant and A3-Rajagopal are concerned, admittedly, the complainant Kalyani, her husband were Directors of the RSR Securities Pvt., Ltd., and the composition later changed as the complainant's brother and A3-Rajagopal became Directors and they have been given a free hand by the complainant to operate her accounts and to trade in shares. In such circumstances, the following judgments are useful for consideration.

15. In Velji Raghavji Patel Vs. State of Maharashtra, , the Supreme Court held as follows:-

Before a person can be said to have committed criminal breach of trust within the meaning of S. 405, IPC., 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. In order to establish "entreatment 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.

In the case of partnership, every partner has dominion over the partnership 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 is not dominion of this kind which satisfies the requirements of S. 405. The prosecution must further 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 receives 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.

Where, therefore, under an agreement between the partners the working partner is authorised to receive the dues of the partnership and to spend the money for the business of the partnership, he cannot be said to have been guilty of criminal breach of trust even with respect to the dues realised by him from certain person by not depositing them in the bank as alleged by the prosecution.

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. 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 persons. But he does not thereby commit any misappropriation.

16. In 1988 L W 213 (Baby M.V. V. State by Sub Inspector), this Court held as follows:-

In order to bring home the guilt of criminal breach of trust to the accused it must first be established that the accused was entrusted with property or with any dominion over the property and that the accused dishonestly misappropriated or converted to his own use that property in violation of any direction of law or any legal contract. The question, which arises for consideration, is, whether the second accused who was the Managing partner of the partnership firm Kopanhagan Pharmaceuticals was entrusted with the assets of the partnership firm?

It is well settled that a partner, who receives partnership property has dominion over that property as a partner quite apart from any arrangement with his other partners. The fact that he is a partner gives him dominion over the property and he does not hold that property in a fiduciary capacity. It may be that by special arrangement between the parties one partner could be regarded as being entrusted with property. But, apart from such special arrangement it cannot be said that a partner who receives partnership property on behalf of his partners has been given dominion over that property by his copartners or has been given dominion over the share of his copartners by the latter. In ordinary cases where a partner receives moneys or an asset belonging to a partnership, or holds money or assets of a partnership he does not hold that money in a fiduciary capacity. Where there is no averment in the complaint that under a special agreement or special arrangement between the partners, the accused partners were solely entrusted with dominion over the property of the partnership firm, these persons who were doing their work in their capacity as partners of the firm cannot be held to have committed any offence of criminal breach of trust. Excepting the case where by special arrangement or agreement fiduciary obligations have been cast, a partner cannot be charged under S. 408, IPC., in respect of the partnership property jointly belonging to him and the complainant partner. Where a partner holds the property belonging to a partnership he holds it as one of the partners entitled to hold it and he cannot be said to hold the property in a fiduciary capacity. In other words, in the absence of any agreement to the contrary, all the partners held, use and have interest in the whole of the property. They have community of interest and hence their rights in the property are not mutually exclusive. Such being the incidents of ordinary partnership, no entreatment of property within the meaning of S. 405, IPC., is possible. The case would be different if there was an agreement among the partners by and under which the managing partner is to hold the properties of the partnership in a fiduciary capacity.

17. In *Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandojirao Angre and Others*, the Supreme Court held as follows:-

The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to

whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special

features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This

is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction

are bleak and therefore no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into

consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

A case of breach of trust is both a civil wrong and a criminal offence. There would be certain situations where it would predominantly be a civil

wrong and may or may not amount to a criminal offence. In the instant case, a complaint was filed for offences punishable under Ss. 406, 467 read

with Ss 34 and 120B of the Penal Code. The property was trust property and one of the trustees was member of the settlor's family. The criminal

proceedings were quashed by High Court in respect of two persons but they were allowed to be continued against the rest. It was held that the

case in question was one of that type where, if at all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting.

Therefore, the criminal proceedings had to be quashed.

18. In 1988 SCC 1704 (Ashok Chaturvedi V. Shitul H.Chandchani), the Supreme Court held as follows:-

Having examined the rival submissions and the averments made in the petition of complaint as well as the evidence of the complainant and the

witnesses before the Magistrate, we are not in a position to accept Mr. Desai's contention that the dispute essentially is a civil dispute, and

therefore, the order of cognizance should be quashed. A mere filing of a claim before the Consumer forum could not make the dispute a civil

dispute. The aforesaid submission of Mr. Desai has to be rejected.

But the question that yet remains for consideration is whether the allegations made in the petition of complaint together with statements made by the

complainant and the witnesses before the Magistrate taken on their face value, do make the offence for which the Magistrate has taken cognizance

of? The learned counsel of the respondent in this connection had urged that the

accused had a right to put this argument at the time of framing of charges, and therefore, this court should not interfere with the order of the Magistrate taking cognizance, at this stage. This argument, however, does not appeal to us inasmuch as merely because an accused has a right to lead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Criminal Procedure Code, he is debarred from approaching the court even at an earliest (sic earlier) point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. It has been held in a number of cases that power u/s 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceedings to continue even where the allegation in the complaint petition do not make out any offence would be tantamount to an abuse of the process of court, and therefore, there cannot be any dispute that in such case power u/s 482 of the Code can be exercised. Bearing in mind the parameters laid down by this court in several decisions for exercise of power u/s 482 of the Code, we have examined the allegations made in the complaint petition and the statement of the complainant and the two other witnesses made on oath before the Magistrate. We are clearly of the opinion that the necessary ingredients of any of the offences have not been made out so far as the appellants are concerned. The petition of complaint is a vague one and excepting the bald allegations that the shares of the complainant have been transferred on forged signatures, nothing further has been stated and there is not an iota of material to indicate how all or any of these appellants are involved in the so called allegation of forgery. The statement of the complainant on oath as well as his witnesses do not improve the position in any manner, and therefore, in our considered opinion, even if the allegations made in the complaint petition and the statement of the complainant and his witnesses are taken on their face value, the offence under Sections 406, 420, 467, 468 and 120B of the Indian Penal code cannot be said to have been made out. This being the position, the impugned order of the Magistrate taking cognizance of the offence dated 5.2.1996 so far as it relates to the

appellants cannot be sustained and the High Court also committed error in not invoking its power u/s 482 of the code. In the aforesaid premises,

the impugned order of the High Court as well as the order of the Magistrate dated 5.2.196 taking cognizance of the offence as against the

appellants stand quashed.

19. From the decisions cited above, it is clear that when a complaint is purely not maintainable and at the worst, only civil liability will arise, such a

criminal complaint can be quashed by the High Court u/s 482 Cr.P.C., Further, as in this case, the entire transaction of trading in shares of the

complainant Kalyani's account and her own company's account, RSR Securities Pvt., Ltd., were operated by her brother Sridhar and another

Director Rajagopal, who is A.3 in her own complaint. When the close relatives and friends of the complainant had independent accounts and

several of them suffered loss resulting in heavy liability towards LKP Shares and Securities Ltd., A3-Rajagopal has been managing these loss

probably by transferring moneys of RSR Securities Pvt. Ltd., and now RSR Securities Pvt. Ltd., itself is having a debit balance of more than 13

lakhs to LKP Shares and Securities Ltd., Therefore, if at all anybody is to be blamed, it is the complainant and her companions who operated her

account. The petitioners who are the President and Coordinator, working in the Head Office at Mumbai, cannot be held responsible for any

omission or commission by A-3, Rajagopal who was in charge of the day-to-day affairs of LKP Shares and Securities Ltd., as well as RSR

Securities Pvt., Ltd., of the complainant. No mens rea can be attributed to the petitioners/accused in X Crime No. 5 of 2003. Accordingly, the

Crime No. X 5/2003 is liable to be quashed and it is hereby quashed.

20. In view of the order passed in CrI.O.P.No:4613 of 2004, quashing the X.Cr.No.5 of 2003, the respondent is directed to further investigate X

Cr.No.928 of 2002 and file a final report.

Consequently, connected CrI.M.Ps are closed.