

(1990) 11 BOM CK 0016

In the Bombay High Court

Case No : Criminal Writ Petition No. 638 of 1986

Janardan Banduji Dighe and another

APPELLANT

Vs

Shri Vishwakarma Mandir Trust and another

RESPONDENT

Date of Decision : 14-11-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 109, 34, 406, 408

Citation : (1991) CriLJ 1095

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : M.R. Suryavanshi, Public Prosecutor, Niteen Jamdar, for the Appellant;

Judgement

1. This is a petition filed by the two original accused in Criminal Case No. 64 of 1985 pending on the file of the Chief Judicial Magistrate, Nasik. The petitioner No. 2 is the son of the petitioner No. 1. The complaint was filed by Shri Vishwakarma Mandir Trust and its Trustees. The basic allegation against the petitioner No. 1 being that he is the Chairman of the Trust and that he is alleged to have purchased a property named Bhidewada which is adjacent to the building of the Trust in the name of the petitioner No. 2, who is his son. The allegation in the complaint is to the effect that the Trust had paid an amount of Rs. 5,000/- against the purchase of this property and that the petitioner No. 1 who is alleged to have told the trustees that the property is purchased in the name of the Trust and that only at a subsequent point of time they came to know that the petitioner No. 1 has purchased the property in the name of his own son and that he has also recovered the rents of the same which ought to have come to the Trust and misappropriated the rents in question. The gravamen of the charge appears to be that the petitioner No. 1 misused his position in his capacity as Chairman of the Trust and purchased the property in his son's name.

2. It is necessary to state at this stage itself that the complaint is totally silent

with regard to the most important ingredient viz., the question as to whether the Trust funds were utilised by the Petitioner No. 1 and if so, to what extent and in what manner. It is hardly permissible for a criminal proceeding to be sustained on the basis of allegations that are vague and incomplete and wanting in material particulars.

3. Mr. Niteen Jamdar, learned Advocate appearing on behalf of the petitioners has filed a certified copy of the death certificate that the petitioner No. 1 died on 5-4-1989. Under these circumstances, the case as against petitioner No. 1 abates. The only point argued by Mr. Jamdar is as to whether the criminal proceeding can survive against accused No. 2. Undoubtedly, if a case has been made out against accused No. 2 and if there is sufficient material against him, there is no difficulty whatsoever in the proceeding being sustainable against accused No. 2 even if original accused No. 1 has died.

4. Mr. Jamdar drew my attention to the order of the learned Additional Sessions Judge, Nasik, dated 5-4-1986, which is an order passed on the Criminal Revision Application No. 115 of 1985, preferred by the present petitioners. The learned Additional Sessions Judge has concluded that in his opinion, a prima facie case has been made out against accused Nos. 1 and 2 and that the learned Magistrate was justified in having issued process and that he was not inclined to interfere with the order of issue of process at the preliminary stage.

5. Mr. Jamdar has submitted, and, to my mind, justifiably and rightly, that the accused No. 2 had nothing to do with the trust since he was not an office bearer or a member of the Trust and that he has been shown as an accused merely because the property came to be purchased in his name. If the Trustees desired to sustain the complaint against accused No. 2, it was necessary for them to have imputed the guilty knowledge or mens rea as far as he is concerned by adducing evidence that he was aware of the fact that the property was purchased out of the funds that were misappropriated from the Trust. There is no such averment or suggestion in the complaint nor is there any such material.

6. Mr. Jamdar has pointed out that the process issued in this case is u/s 34 of the Indian Penal Code. Even though the original complaint proceeded on the footing that the accused No. 2 has abetted his father and is, therefore, liable u/s 109, the learned Magistrate has issued process u/s 34, IPC. As pointed out by Mr. Jamdar, before invoking S. 34, I.P.C., it was necessary for the prosecution to have alleged and established meeting of minds, community of interest and further-more that the two accused had acted in furtherance of their common intention. In the absence of these vital ingredients, it is not permissible for the present complaint to be sustained against accused No. 2. The Supreme Court while dealing with the powers of the High Court u/s 482 of the Code of Criminal Procedure has observed in the case Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, that in a situation where the complaint does not disclose and make but the vital ingredients of the offence, that the proceeding is liable to be quashed. To my mind, the submission advanced on behalf of the petitioner

No. 2 is valid and deserves to be upheld in so far as the present complaint does not disclose the necessary ingredients for sustaining a charge u/s 406 or 408 read with S. 34, IPC as against petitioner No. 2.

7. This case presents an issue of some importance, touching the question as to whether at all, it is permissible to invoke S. 34 IPC along with S. 406 or 408. In the first instance, S. 34 lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. This is the principle enunciated in Mahbub Shah's case reported in (1945) 47 Born LR 941 : 1945 Cri LJ 689 . The section also deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of common intention, each person is liable for the result of them all as if he had done them himself; for "that act" and "the act" in the latter part of the section must include the whole action covered by a "criminal act" in the first part, because they refer to it. (See Emperor Vs. Barendra Kumar Ghosh,) . In the case of Gurdatta Mal and Others Vs. The State of Uttar Pradesh, , it was pointed out that the Section does not create a distinct offence; it lays down only a principle of joint criminal liability and the Supreme Court further clarified in B.N. Srikantiah and Others Vs. The State of Mysore, , that it is only a rule of evidence and does not create a substantive offence. The leading feature of S. 34 is the element of participation in action. (See Chikkarange Gowda and Others Vs. State of Mysore, and Jagir Singh Vs. State of Punjab, Consequently, common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. (See Sitaram Dhaku Chawan Vs. State,). What emerges, therefore, is that, the learned Magistrate, in the present case, could have invoked the provisions of S. 34, provided he had before him material in the form of evidence to justify the charge that accused No. 2 had acted in concert, in furtherance of a pre-arranged plan which could have been inferred either from his conduct or from circumstances that were on record. There is a total vacuum as far as any of the ingredients of S. 34 are concerned in the present case and consequently, there was no justification whatsoever for the involvement of accused No. 2. Mr. Jamdar also advanced another interesting argument to the effect that the essential ingredient of the offence of breach of trust is that the accused had dominion or entrustment of the property in respect of which the offence has been committed. Where the principal accused is a Trustee and where the charge against him is that he had control or dominion over the Trust property and that he has acted in breach of the trust of the terms of such entrustment and consequently, committed a criminal offence, it is highly doubtful as to whether at all another accused, who was not an office bearer or a member of the Trust and who had neither control nor dominion over the property could at all have been charged with an offence u/s 34 in respect of such Trust property. Since accused No. 1 has died and the case against him has abated, this question has now been rendered academic and, therefore, does not need to be examined.

8. Before parting with this case, I would like to observe that I was considerably impressed with the manner in which the young advocate Mr. Jamdar has studied his brief, his intelligent application and the manner in which he very correctly presented the matter on behalf of his client.

9. In the result, the petition succeeds. The criminal proceedings, being, Criminal Case No. 64 of 1985 are quashed. The judgment and order dated 5th April 1986 passed by the Additional Sessions Judge in Criminal Revision Application No. 115 of 1985 is also set aside.

10. Petition allowed.