

(2016) 10 BOM CK 0094

In the Bombay High Court

Case No : Criminal Writ Petition No. 624 of 2006

Kamlesh s/o Harivallabh Mehta

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-10-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, Section 202
Penal Code, 1860 (IPC) — Section 405, Section 406

Citation : (2017) 1 AIRBomRCri 7 : (2017) ALLMRCri 2249 : (2017) 2 BomCR(Cri) 146

Hon'ble Judges : N.W. Sambre, J.

Bench : Single Bench

Advocate : Mr. K.D. Munde, Addl. Public Prosecutor, for the Respondent No. 1; Mr. A.R. Vaidya, Advocate holding for Mr. Hiraji Gaikwad, Advocate, for the Respondent No. 2; Mr. Sandesh Hange, Advocate holding for Mr. R.A. Tambe, Advocate, for the Petitioners

Final Decision : Allowed

Judgement

N.W. Sambre, J. (Oral) - By present petition, the petitioners have sought a declaration that the second criminal complaint, for the same cause, is not maintainable and sought quashing of the said proceedings.

2. The facts, as are necessary for decision of the present petition, are as under :

The petitioners and respondent no.2 entered into a partnership on 29th January, 2004 with an object of manufacturing of self-net required as a spare in a unit of refrigerator. It is claimed that despite there is an arbitration clause in the deed of partnership, respondent no.2 - complainant lodged a complaint, being Regular Criminal Case No.660 of 2005 alleging illegal withdrawals of amount by the petitioners from the partnership firm and sought their prosecution for offences punishable under sections 420, 468, 471, 506 read with section 34 of the Indian Penal Code, on 7th June, 2005. On 7th June, 2005, the learned Magistrate directed to send the complaint to police station, Waluj, for investigation in

accordance with provisions of section 156 (3) of the Code of Criminal Procedure. The petitioners and respondent no.2 thereafter appear to have resolved the dispute, as is apparent from the report forwarded by the Police Station Officer to the Judicial Magistrate First Class, 2nd Court, Aurangabad, in the above referred complaint case on 4th August, 2005, which has prompted the learned Magistrate to pass an order on 30th August, 2005 disposing of the complaint. The said order reads thus :-

"Perused report of police. Complainants absent.

Their adv. Present Adv. Submitting the complaint settled out of court and so they have not come.

So the report reveals no further proceeding can be protracted.

Hence the complainant's case disposed."

3. Thereafter, the petitioners issued a public notice that the partnership with respondent no.2 has come to an end from 30th September, 2005, which was preceded with a registered post notice dated 22nd September, 2005.

4. Another criminal complaint case, being Regular Criminal Case No.1571 of 2005 came to be initiated with same set of facts by respondent no.1 against the petitioners for offences punishable under the same sections and in view of law laid down by the Apex Court, in the matter of Mahesh Chand v. B. Janardhan Reddy, reported in AIR 2003 SC 702, the Magistrate ordered investigation under section 156 (3) of the Code of Criminal Procedure.

5. As a consequence thereof, on 21st August, 2006, an offence came to be registered against the petitioners. As such, present petition seeking declaration and quashing of the second complaint case as not maintainable.

6. Learned Counsel appearing on behalf of the petitioners would submit that earlier complaint being R.C.C. No.660 of 2005 was disposed of in view of settlement between parties and was not dismissed for want of prosecution. According to him, since the dispute was settled, the complainant had opted to remain absent. As such, the report as was tendered by the Investigating Officer, pursuant to the order of the Magistrate, came to be accepted and the earlier complaint came to be disposed of. According to him, the report of the Investigating Officer in clear terms speaks of settlement of the dispute between the parties. In addition, he would invite my attention to the contents of public notice issued by the petitioners cancelling relationship with respondent no.2 as a partner in the said firm and as such, would urge that the complaint itself is not maintainable.

7. In the above referred factual background, learned Counsel, by relying upon the judgment of the Apex Court, in the matter of Poonam Chand Jain & anr. v. Fazru, reported in 2010 ALL MR (Cri) 595 (S.C.), would submit that the second complaint, pursuant to which an offence is registered against the petitioners in

their capacity of partners, is not maintainable.

8. In addition, learned Counsel would rely upon the judgment of the Apex Court, in the matter of Velji Raghavji Patel v. State of Maharashtra, reported in AIR 1965 SC 1433, so as to submit that the criminal proceedings under section 409 of the Indian Penal Code cannot be initiated against a partner.

9. Per contra, Mr Vaidya, learned Counsel appearing on behalf of respondent no.2 would urge that the second complaint is very much maintainable in view of the judgment of the Apex Court in Mahesh Chand (supra) as is relied upon by the learned Magistrate in his order of issuance of process. He would then add that since commitments in the settlement of the first complaint were not honoured, the second complaint in the said background is very much maintainable and would invite attention of this court to paragraphs 7 and 8 of the said complaint. According to him, during investigation of the crime registered against the petitioners, if it is noticed that they have not committed any offence, the consequences will follow. He would then urge that there is satisfaction of requirement of section 409 of the Indian Penal Code, the petitioners, being partners, were entrusted with the property under section 409 and there is prima facie case for criminal breach of trust on their part. He would urge that the factual matrix as narrated in the complaint needs a thorough investigation.

10. Having dwelt upon rival submissions made by the parties, it is required to be noted that the occasion for disposal of the first complaint for the Magistrate was a report submitted by the Investigating Officer, pursuant to the order of the Magistrate passed on 7th June, 2005. In the said report, admittedly respondent no.2 - complainant had agreed that the matter was settled and accordingly chose to remain absent before the Magistrate when the Magistrate disposed of the complaint, based on the report of the Investigating Officer, on 30th August, 2005. The public notice by petitioners as is produced at Exh.33 severing the relation with respondent no.2 - complainant as a partner in the firm is not in dispute. Prima facie, it appears that respondent no.2 - complainant has chosen to remain absent before the Magistrate in the first complaint, as his interest was taken care of as the matter was settled between the parties.

11. Upon perusal of the second complaint, being Regular Criminal Case No.1571 of 2005, it is an admitted position that on the same set of facts, second complaint came to be initiated with the same claim as was made in the first complaint only with additional pleadings in the second complaint that the settlement agreement as was reached at, was not honoured by the petitioners.

12. In the above referred factual background, the law laid down by the Apex Court, in the matter of Poonam Chand Jain (supra) is to be appreciated, particularly the observations appearing in paras 23, 24, 25 and 26 which read thus :

"23. Almost similar questions came up for consideration before this Court in the case of Pramatha Nath Talukdar and another v. Saroj Ranjan Sarkar - (AIR 1962

SC 876). The majority judgment in *Pramatha Nath* (supra) was delivered by Justice Kapur. His Lordship held that an order of dismissal under Section 203 of the Criminal Procedure Code (for short "the Code") is, however, no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. This Court explained the exceptional circumstances as (a) where the previous order was passed on incomplete record (b) or on a misunderstanding of the nature of the complaint (c) or the order which was passed was manifestly absurd, unjust or foolish or (d) where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings. This Court made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In paragraph 50 of the judgment the majority judgment of this Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. This Court very clearly held that it cannot be settled law which permits the complainant to place some evidence before the Magistrate which are in his possession and then if the complaint is dismissed adduce some more evidence. According to this Court such a course is not permitted on a correct view of the law. (para 50, page 899)

24. This question again came up for consideration before this Court in *Jatinder Singh and others v. Ranjit Kaur* - (AIR 2001 SC 784). There also this Court by relying on the principle in *Pramatha Nath* (supra) held that there is no provision in the Code or in any other statute which debar complainant from filing a second complaint on the same allegation as in the first complaint. But this Court added when a Magistrate conducts an enquiry under Section 202 of the Code and dismisses a complaint on merits a second complaint on the same facts could not be made unless there are "exceptional circumstances". This Court held in para 12 if the dismissal of the first complaint is not on merit but the dismissal is for the default of the complainant then there is no bar in the filing a second complaint on the same facts. However if the dismissal of the complaint under Section 203 of the Code was on merit the position will be different. Saying so, the learned Judges held that the controversy has been settled by this Court in *Pramatha Nath* (supra) and quoted the observation of Justice Kapur in paragraph 48 of *Pramatha Nath* (supra):-

".....An order of dismissal under Section 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should

be given another opportunity to have his complaint enquired into....."

25. Again in Mahesh Chand v. B. Janardhan Reddy and another - (2003) 1 SCC 734, a three Judge Bench of this Court considered this question in paragraph 19 at page 740 of the report. The learned Judges of this court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous complaint was dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In Mahesh Chand (supra) this Court relied on the ratio in Pramatha Nath (supra) and held if the first complaint had been dismissed the second complaint can be entertained only in exceptional circumstances and thereafter the exceptional circumstances pointed out in Pramatha Nath (supra) were reiterated.

26. Therefore, this Court holds that the ratio in Pramatha Nath (supra) is still holding the field. The same principle has been reiterated once again by this Court in Hiralal and others v. State of U.P. & others - AIR 2009 SC 2380. In paragraph 14 of the judgment this Court expressly quoted the ratio in Mahesh Chand (supra) discussed hereabove."

13. From the discussions in the above referred judgment, what could be inferred is, the second complaint is very much maintainable and there is no bar to that effect. However, the embargo to prefer second complaint is that of moved on the same set of facts and the evidence which was available when the first complaint was filed and decided on merits. It is required to be noted that once the Magistrate conducts an inquiry under section 202 of the Code of Criminal Procedure and dismisses the complaint on merits on the same set of facts, the second complaint is not maintainable, provided the first complaint is not dismissed on incomplete record or on misunderstanding of the nature of the complaint or was manifestly absurd, unjust or foolish or where new facts, which could not, with reasonable diligence have been brought on record in the previous proceedings.

14. In the present case, what is required to be noted is, the first complaint i.e. Regular Criminal Case No.660 of 2005 was initiated on or about 7th June, 2005, wherein it is specifically alleged that the petitioners and respondent No.2 are the partners of the partnership firm, which was formed with an intention to carry on business. It is claimed that loan of Rs.17,00,000/- and working capital of Rs.10,00,000/- was sanctioned and the petitioners-accused withdrew an amount of Rs.19,80,000/- as against the bogus bills of purchase of machinery to the bank. It is claimed that the machinery was purchased for the business of partnership firm and in above referred manner, a fraud was practised. The trial court, upon perusal of the complaint, passed an order of investigation under section 156 (3) of the Code of Criminal Procedure and pursuant to the same, the Police Inspector submitted a report that the accused and respondent No.2 have settled their dispute. The statement of respondent No.2-complainant was also

recorded. It is also stated in the report that the parties to the proceedings, on 23rd June, 2005, have sat together and settled the issue and there nothing remains further to be a bone of dispute. It is further claimed that on 4th July, 2005, they will take the accounts of the firm by visiting the bank and also endorse the settlement. As a consequence thereof, the petitioners remained absent and based on the report and the statement of the complainant that the matter was amicably settled, disposed of the complaint, which has to be termed as an order under section 203 of the Code of Criminal Procedure. A public notice about cancellation of relationship with the partners i.e. present petitioners was also issued, which was never objected to by respondent No.2. The only difference in the second complaint, being Regular Criminal Case No.1571 of 2005, dated 12th December, 2005 is, that though it was agreed that the dispute will be settled on 23rd June, 2005 by checking accounts of the partnership firm, neither the account was furnished nor the amount of Rs. 19,80,000/- was deposited. The above referred contents of the second complaint speak of settlement between the parties, which was not honoured. It is to be noted that if the commitment of 23rd June, 2005, was not honoured, it was always open for respondent No.2-complainant to bring the same to the notice of the Magistrate before first complaint, being Regular Criminal Case No.660 of 2005 was disposed of/ dismissed under section 203 of the Code of Criminal Procedure on 30th August, 2005. It depicts from the record that the present respondent has chosen to remain absent and has also not lodged any objection or resistance with the Investigating Officer. In view thereof, in my opinion, one hardly sees any reason for entertaining the second complaint on the same set of facts, when the only difference of not honouring the commitment dated 23rd June, 2005 was well within the knowledge before dismissal of the first complaint.

15. In my opinion, there was hardly any cause for respondent no.2 to prefer second complaint and it has to be concluded such a second complaint is not maintainable.

16. This takes me to the second submission of the petitioners, whether the petitioners could be prosecuted for an offence punishable under section 409 of the Indian Penal Code, in the capacity of partners. The said issue is no more res integra. The judgment of the Apex Court, in the matter of Velji Patel (supra), has already dwelt upon the controversy and observed in paragraphs 6 and 7, thus :-

"6. 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* 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 be 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 of a breach of trust and has acted dishonestly towards his co-partners, if an account 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 was followed. One of those cases was *Jagannath Raghunathdas v. Emperor*, AIR 1932 Bom 57 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 lie 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 seem 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.

7. It seems to us that the view taken in *Buban Mohan Rana* case 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 receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or in other words cannot be hold to have been "entrusted" with dominion over partnership properties."

17. In the facts of the present case, upon perusal of both complaint cases, what could be inferred is, there is no dominion (supremacy/control) of any of the partners over the working of the partnership firm. It appears from the record that the loan total amounting to Rs.27,00,000/- i.e. Rs.17,00,000/- towards term loan and Rs.10,00,000/- towards working capital was sanctioned to the partnership firm and not to an individual partner with any rider to disburse the amount at the behest of a particular partner. It is upon production of the receipts of purchase of machinery for the partnership firm, the concerned bank has permitted payment of Rs.19,80,000/- towards the machinery of the partnership firm. In view thereof, to claim that the said amount of Rs.19,80,000/- was withdrawn by practising fraud on respondent No.2-complainant who claims to be a partner of the firm, rather appears to be a statement which cannot be covered within the meaning of sections 405 and 406 of the Indian Penal Code. The only conclusion that could be drawn from the contents of the complaint as are taken at its face value that the amount was belonging to the partnership firm and partners i.e. petitioners were entitled to deal with it in lawful manner. There was no special agreement between the partners to receive the money belonging to the partnership in the fiduciary capacity or neither the same was entrusted with dominion over the partnership property. It was a business in routine. In this background, the law laid down in the matter of Velji Patel (supra) clearly governs the case in hand. In the light of above observations, the prosecution as is initiated, in my opinion, is not tenable against the members of the partnership firm. As such, the present petition needs to be allowed. Rule made absolute in terms of prayer clause B.