
(1994) 02 CAL CK 0010
In the Calcutta High Court
Case No : Criminal Rev. No. 8 of 1991

Mahabir Prasad Sharma

APPELLANT

Vs

Sri Kedar Nath Pandey and Others

RESPONDENT

Date of Decision : 03-02-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245, 401, 482
Penal Code, 1860 (IPC) — Section 405, 409, 420

Citation : (1994) 1 CALLT 297

Hon'ble Judges : Nisith Kumar Batabyal, J

Bench : Single Bench

Advocate : Dilip Kumar Dutta and Rabindra Narayan Das, for the Appellant; Alok Mitra and T.K. Sen, for the Respondent

Judgement

Nisith Kumar Batabyal, J.—This revisional case arises out of an application u/s 401 read with Section 482 of the Code of Criminal Procedure and is directed against the order dated 6-9-1990 passed by the learned Metropolitan Magistrate, 17th Court, Calcutta, in Criminal Case No. C-328/87 [Kedar Nath Pandey v. Mahabir Prasad Sharma]. The revision-petitioner is an Advocate practising in the City Civil Court, Calcutta and other courts. The said case had its origin in a Naraji petition lodged by the opposite party No. 1 against the submission of a report in final form dated 10.8.1987 in G.R. Case No. 2833 of 1986 which was commenced upon an application, u/s 156(3) of the Cr. P.C. being registered as C-357 of 1986. A xerox copy of the Naraji petition is annexed as Annexure "A" with the revision petition.

(2) On 13.1.1988 the learned Additional Chief Metropolitan Magistrate, Calcutta, was pleased to take cognizance and subsequently transfer the complaint case raised on the Naraji petition to the court of the learned Metropolitan Magistrate, 17th Court, Calcutta for disposal. Some witnesses have been examined in the complaint case and some documents have been exhibited. After the closing of the prosecution case the revisional petitioner has filed an application on 9.8.1990

u/s 245 Cr. P.C. praying for discharge. A copy of the application has been marked as Annexure "B" to the revision petition. The opposite party No. 1 filed an application against the petition for discharge. The learned Metropolitan Magistrate after hearing both sides and considering the materials placed before him was pleased to reject the said application for discharge. Being aggrieved by and dissatisfied with the said decision- of the learned Trial Magistrate, the revisionist has come up before this Court for quashing the said order on various grounds.

3. It appears from perusal of the impugned order of the learned Magistrate dated 6.9.90 in case No. C-328/87 that there were elements, prima facie, of a case under Sections 409 and 420 I.P.C. against the revisionist.

4. The learned senior Advocate Mr. Dutta, appearing on behalf of the revisionist, has submitted that charges u/s 409 and 420 I.P.C are contradictory. Either a charge u/s 405 or a charge u/s 420 I.P.C. is maintainable. It has further been submitted by the learned Advocate for the revisionist that the essential ingredients of an offence u/s 405 I.P.C. have not been, prima facie, made out within the four corners of the petition of complaint or the evidence adduced by the prosecution side.

5. The learned Advocate for the opposite party No. 1, Mr. Aloke Mitra, has tried to argue very convincingly that there are elements, prima facie, of an offence u/s 405 I.P.C. and he has also argued that both the charges under Sections 405 I.P.C. can go together.

6. Considered the submissions made by the learned Advocates of both side. From a plain reading of the language of Section 420 I.P.C. it appears that it has got two essential ingredients, namely, deceit i.e. dishonest or fraudulent misrepresentation to a person and the inducing of that person thereby to deliver property [vide] : Mobarik Ali Ahmed Vs. The State of Bombay, . In this case it is not the case of the opposite party No. 1 that any deceit was exercised over him by including him to part with the subject-matter of the offence, i.e. cash money in the form of deposit in a competent civil court as arrear of rent by the tenant in favour of the landlord whose lawyer was the revisionist. As per Vakalatnama, the Advocate of the opposite party No. 1 was lawfully entitled to withdraw the amount deposited in the court by the opposite party No. 1. Therefore, there is absolutely no element of deceit or dishonest or fraudulent misrepresentation to induce the opposite party No. 1 to deliver any property to the revisionist. It is perfectly clear that there was absolutely no material for framing of a charge u/s 420 I.P.C. against the revisionist by the learned Magistrate. The learned Magistrate illegally exercised his jurisdiction in the matter.

7. So far as the other offence is concerned, the essential ingredients of the offence are that it must be proved that the accused was entrusted with some property or with any dominion or power over it. Secondly, it has to be established further in respect of the property so entrusted, there was dishonest

misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract by the accused himself or by someone else which he willingly suffered to do, [vide Chelloor Mankkal Narayan Ittiravi Nambudiri Vs. State of Travancore-Cochin, The fundamental element of the offence of criminal breach of trust is that a property must be entrusted and the dominion of the property should be given to that person. Mere retention of the property without dishonest misappropriation or illegal conversion of the same does not amount to criminal breach of trust u/s 405. Mens rea constitutes the life breath of an offence under this section. A person can be said to have done a thing dishonestly if he does so with an intention to cause wrongful gain to one person or wrongful loss to another person. Wrongful loss means loss of property to which a person is entitled while wrongful gain to a person means a gain to him by unlawful means of property to which the person gaining is not legally entitled. Here, in our case there are sufficient materials to show, prima facie, that the revisionist held the amount withdrawn by him from the court on account of his client, the opposite party No. 1 as trustee. The grievance of the opposite party No. 1 is that for about two years the learned lawyer did not inform the client about the withdrawal of money from the Court. This conduct of the learned lawyer is improper but by no reasoning can it be said that this wrongful detention of the amount withdrawn without intimation to the opposite party No. 1 can be said to be an act done dishonestly within the meaning of Section 405 I.P.C. Moreover, in this case it appears that about two weeks before the first complaint to police was made by the opposite party No. 1, the revisionist wrote a letter to the opposite party No. 1 acknowledging withdrawal of the amount deposited in court by the tenant in favour of the Opposite Party No. 1 and giving of that amount as loan to the revisionist by the opposite party No. 1. A modality was charted out how the amount would be repaid. No little finger was raised by the opposite party No. 1 in protest against that letter of his lawyer, here the revisionist. The opposite party No. 1 waited for two weeks and then lodged a complaint to the police. There is no explanation about the non-sending of a letter of protest or the delay of making the complaint to police during this period. It further appears from the letters written by the revisionist to the opposite party No. 1 that he not only agreed to repay the entire amount but also agreed to pay interest at the rate of 18% per annum. It beats common sense how it can be said that there was any element of causing wrongful loss to the opposite party No. 1 or wrongful gain to the revisionist by this conduct of the revisionist. In my view, there is absolutely no element of mens rea in the case as made out by the prosecution side. In the circumstances, it must be held that no charge could be framed u/s 406 I.P.C.

8. In this view of the matter, I hold that the learned Magistrate misdirected himself and illegally framed charged under Sections 406 and 420 I.P.C. In the result, the revisional application succeeds and the impugned order is quashed. There will be no order as to costs.