
(2008) 06 BOM CK 0150

In the Bombay High Court

Case No : Writ Petition No's. 1453 of 2000 and 318 of 2001

Mahindra Dipchand Jain

APPELLANT

Vs

Ashok Sardarmal Parekh and Others

RESPONDENT

Date of Decision : 03-06-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 405, 406

Citation : (2008) 5 ALLMR 635 : (2008) CriLJ 3825

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : S.R. Pasbola, for the Appellant; P.A. Pol, App., for the Respondent

Judgement

Nishita Mhatre, J.—The petitioner in both the matters is a partner of M/s. Deep Enterprises. Respondent No. 1 was also one of the partners of the firm besides one Smt. Asha Suresh Parekh who was the 3rd partner. The petitioner and the Respondent No. 1 jointly purchased the property bearing Tikka No. 5, CTS No. 178 situated at Kharkar Ali, Thane on 10-4-1994. They executed a registered sale deed with the vendor i.e. Respondent No. 2 herein. Thereafter the petitioner, Respondent No. 1 and Asha Suresh Parekh formed a partnership firm i.e. Deep Enterprises which is in existence even today. Respondent No. 2 executed a power of attorney in favour of the petitioner on 2-6-1999. This power of attorney authorised the petitioner to appear for Respondent No. 2 before the Thane Municipal Corporation and other Government and Revenue Authorities for development of the property. It appears that despite the sale deed executed in 1995, the property records continued to be in the name of Respondent No. 2 and therefore, the power of attorney was executed in favour of the petitioner.

2. It appears that Respondent No. 1 had a grievance against the petitioner that he had not furnished any details of the amounts received from the proposed flat purchasers and had continued with the construction of the building on the aforesaid property. Civil Suit No. 137 of 2000 was filed by Respondent No. 1 against the petitioner and Respondent No. 2 in the Court of Civil Judge, Senior

Division, Thane. An injunction was sought restraining the petitioner from continuing with the construction on the property and from creating third party rights. However, the injunction was refused by the Court. Instead of carrying the litigation further, Respondent No. 1 filed a complaint before the Chief Judicial Magistrate, Thane against the petitioner and Respondent No. 2 being Criminal Case No. 387 of 2000. The allegations in this complaint are, inter alia, that the petitioner/accused No. 1 had in collusion with Respondent No. 2 i.e. the accused No. 2 developed the aforesaid property in the name of accused No. 2 on the basis of the power of attorney which was executed in favour of the petitioner despite the fact that the property was purchased jointly by the petitioner and the respondent No. 2 and was to be developed by Deep Enterprises, the partnership firm. It is also alleged "the accused No. 1 was entrusted and had a dominion over the property in question and he was supposed to develop the said property for the partnership firm". Process has been issued against the petitioner and Respondent No. 2. Hence, the petitioner filed Writ Petition No. 1453 of 2000 for quashing the process issued against him.

3. Respondent No. 1 filed another complaint being Criminal Case No. 366 of 2000 against the petitioner. In this complaint, the main grievance of the complainant i.e. Respondent No. 1 is that a shop in the constructed building was sold to one Suresh Devraj Shah who had paid an amount of Rs. 6,76,500/- by several cheques to the petitioner and that the receipts were issued by the petitioner in his capacity as partner of M/s Deep Enterprises. In his complaint, Respondent No. 1 has also stated that an account had been opened in the name of M/s. Deep Enterprises in Janata Sahakari Bank by describing it as a proprietary firm and that the cheques for the aforesaid amount had been deposited in this account. It is further alleged that the amounts deposited were withdrawn by the petitioner without the consent of the other partners and, therefore, the petitioner had committed an offence of criminal breach of trust punishable u/s 406 of the Indian Penal Code.

4. Mr. Pasbola, the learned advocate for the petitioner, contends that there can never be entrustment of property belonging to a partnership firm by one partner to another. He submits that if there is a dispute between the partners, the only remedy that a partner may have against the other partner is to file a suit for accounts. He further submits that assuming the petitioner had constructed the property by encashing cheques furnished in the name of M/s. Deep Enterprises, Respondent No. 1 would only be entitled to accounts and there is no question of entrusting the property by the partnership firm to the petitioner. He submits therefore that the ingredients constituting an offence of criminal breach of trust are not fulfilled and, therefore, the process issued in both the proceedings before the learned Magistrate need to be quashed and set aside.

5. A perusal of Section 405 of the Indian Penal Code indicates (hat four ingredients have to be satisfied before an act can constitute an offence of criminal breach of trust. The essentials of the offence of criminal breach of trust

are: (i) entrustment of property or dominion over the property by one person to another; and (ii) a dishonest misappropriation or conversion of that property by the agent for his own use; or (iii) a dishonest use or disposal of the property in violation of the mandate of law prescribing the mode in which the entrustment is to be discharged; or (iv) a dishonest use or disposal of property in violation of the terms through any legal contract either expressed or implied regarding the discharge of the entrustment or wilfully allowing some other person to do so.

6. Thus, the fact of entrustment of the property must be established before a charge u/s 405 can be made out. In the present case, the property belonged to the respondent No. 1 and the petitioner. They had jointly purchased the property in order to develop the same. It was to be developed by the partnership firm M/s. Deep Enterprises when both the Petitioner and Respondent No. 1 were partners. Therefore, the question of the petitioner being entrusted with the property does not arise as one partner cannot entrust the property of the firm to another. So far as the question of having dominion of the property is concerned, all the partners have dominion over the property of the partnership concern. In the present case, the property though purchased by the petitioner and Respondent No. 1, jointly, it was to be developed by the partnership concern and therefore the petitioner and Respondent No. 1 have dominion over the property. As these basic ingredients which constitute an offence u/s 405 are not fulfilled, in my opinion, the learned Magistrate has erred in issuing process in the matter.

7. Mr. Pasbola has rightly relied on the judgments of the Supreme Court in Jagannath Raghunathdas v. Emperor (1932) 33 Cr LJ 317 : AIR 1932 Bom 57; Velji Raghavji Patel v. The State of Maharashtra 1964 BLR LXVII 443 : 1965 (2) Cri LJ 431 and The State of Maharashtra Vs. Gopal Chunimal Podhar and Another, . The Bombay High Court in the case of Raghunathdas v. Emperor (supra) had held that Section 405 of IPC is wide enough to cover the case of a partner who is given authority by the other partners to collect moneys or property of the firm. The Court was of the view that he is entrusted with dominion over that property and if he dishonestly misappropriates it, then he comes within the section. Thus, the Bombay High Court had accepted the proposition that a partner could be prosecuted by another for criminal breach of trust. However, the Division Bench had a word of caution that the prosecution must prove the facts from which the only possible inference which can be reasonably drawn is that there was a dishonest Intent and that the Court ought to be careful when there are charges of criminal breach of trust against the partners. The Court has observed that it would be impossible in many cases to say what is the share of the accused and whether he was indebted to the firm or whether the firm was indebted to him and if the firm is indebted to him, whether there was any dishonest intent in his withdrawal.

8. While deciding the case of the Velji Raghavji Patel (supra), the Supreme Court has not accepted the view taken by the Bombay High Court in Jagannath Raghunathdas (supra), but has opined that the view of the Calcutta High Court in

the case of Bhuban Mohan Rana v. Surendra Mohan Das ILR (1952) 2 Cal 23 : 1951 (52) Cri LJ 723 was correct. The Supreme Court has observed thus:

It seems to us that the view taken in Bhuban Mohan Rana's case by the later Full Bench of the Calcutta High Court is the right one. Upon the plain reading of Section 405, Indian Penal Code, 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 held to have been "entrusted" with dominion over partnership properties.

9. This judgment of the Supreme Court has been followed by a learned single Judge of this Court in the case of The State of Maharashtra Vs. Gopal Chunimal Podhar and Another, and by the other High Courts in the cases cited at the bar. Therefore, in my opinion, the learned Magistrate has erred in issuing process in both the cases. If Respondent No. 1 was aggrieved by the fact that the petitioner had not given accounts it was open for Respondent No. 1 to file proper proceedings rather than resorting to criminal action against the petitioner.

10. In the result, the process issued is quashed and set aside. Rule made absolute in terms of prayer Clause (a) in both the petitions.