

(2000) 05 PAT CK 0035

In the Patna High Court

Case No : Criminal Miscellaneous No. 16293 of 1999

Nandlal Lakhotia

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 01-05-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 405, 409, 482
Penal Code, 1860 (IPC) — Section 408, 420

Citation : (2001) CriLJ 1900 : (2000) 2 PLJR 882

Hon'ble Judges : S.K. Chattopadhyaya, J

Bench : Single Bench

Advocate : T.K. Jha and D.K. Jha, for the Appellant; A.K. Thakur for Respondent No. 2 and K.P. Singh, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Chattopadhyaya, J.—The order taking cognizance and issuance of process dated 21-4-1999 has been impugned by the petitioner in this application u/s 482 of the Code of Criminal Procedure.

2. One Dhiraj Lal D. Mehta, one of the partners of Bharat Tractor House filed a complaint in the Court of the Chief Judicial Magistrate, Patna alleging, inter alia that being a working partner of the firm the petitioner has committed criminal breach of trust by dishonestly preparing false stock position and thereby misappropriating certain amount of the firm.

3. According to the complaint petition, the complainant and the petitioner constituted a firm known as M/s. Bharat Tractor House. The fund was provided by both the partners on the basis of equal share in the profit and loss. Earlier agreement dated 15-8-1974 executed by the partners of the firm was modified with consent and a fresh partnership deed was brought in existence on 27-3-1992. As per this agreement of March, 1992 the petitioner became the working partner and was actively and solely engaged in conducting the affairs of business of the firm. Being a working partner he was also being paid

remuneration at the rate of one thousand per month for his work in the firm. This remuneration was by way of salary irrespective of profit and loss of the firm as contemplated in clause (b) of the partnership deed. He was entrusted with the properties including raw materials, cash and for that he had to maintain the stock position and cash book showing income and expenditure of the firm. He was to deposit the money of the firm in the account of the firm at Canara Bank.

4. Though the complainant was a sleeping partner of the firm but sometime in the month of September, 1996 the suspicion arose regarding dishonest and fraudulent act of the accused regarding defalcation of the firm's stock and money. He asked for accounting of stock from the accused which was prepared in respect of goods available in the stock in November, 1996. This latest position of the stock was prepared in the pen of Brajesh Lal Lakhotia alias Goga, son of the accused and partly by Sharad Mehta son of the complainant. The stock position revealed that the articles of worth Rs. 12,22,685.70 were available but on physical verification the complainant found in presence of his son Sharad Mehta and other witnesses that stock materials were only to the extent of Rs. 5,75,555.12p. The stock verification was done on 24-11-1996. For this shortage of the stock, it is stated, the accused became perturbed and perplexed and practically started weeping after confession of guilt in presence of the witnesses. The complainant out of sympathy gave some time to the accused to either explain the shortage or to deposit Rs. 6,47,130.00 in the firm's account by the 2nd week of December. The accused expressed his inability to deposit the said amount within a short period and sought time till the end of January, 1997. In the first week of January when the complainant tried to contact the accused he was found absent and left Patna after locking the firm.

5. On these allegations the complainant filed a complaint petition maintaining, inter alia, that the accused has fraudulently cheated the fund to a tune of Rs. 6,47,130 by which the complainant has suffered wrongful loss and the same has caused wrongful gain to the accused. The complainant has undertaken in his complaint petition to prove the factum of entrustment, misappropriation and forgery and cheating on the basis of documentary evidence prepared by the accused himself and other oral evidence.

6. On such complaint being filed the complainant and his witnesses were examined and the learned Magistrate after being satisfied took cognizance of the offences under Sections 408 and 420 of the Indian Penal Code and directed to issue process u/s 204 of the Code of Criminal Procedure.

7. According to Mr. Jha, learned counsel for the petitioner, the allegations made in the complaint petition do not constitute an offence and even if some cause of action is there it is a pure case of civil nature. He contends that both being the partners of a firm and having a definite share, the complainant could ask for accounts of the firm from the petitioner and there is no question of any defalcation made by the accused. Referring to the deed of partnership, which is annexed with the complaint petition, learned counsel urged that both the

partners of the firm are jointly responsible for carrying on the business of the firm and if there is any misappropriation of fund by any of the partners, either of them can ask for accounts and the dispute may be referred to the arbitration.

8. The argument, of Mr. Jha is that until the son of the complainant Sharad Kumar Mehta intervened in the affairs of the firm there was no difference between these two partners and a deed of resolution was prepared where it was agreed between the petitioner and the complainant that the complainant would be paid a sum of Rs. 2,21,000/- (two lac and twenty one thousand) by the petitioner in lieu of retirement of the complainant from the firm. This was made effective from 31-3-1997. In this connection, he has referred to annexure-4, a cheque dated 14-1-1997 issued by the petitioner in favour of the complainant.

9. Mr. Thakur, learned counsel appearing on behalf of the Opposite Party No. 2, on the other hand, countered the argument of Mr. Jha by submitting that being a working partner the petitioner was entrusted not only with the amount of the firm but also the stock of materials. If a partner subsequently disposes of some of the properties of the firm for his individual gain and does not mention the amount of such dispossession in the balance-sheet of the firm, it is a clear case of criminal breach of trust. Lastly, he submits that in this case admittedly the petitioner is a working partner whereas the complainant being a sleeping partner of the firm entrusted entire stock of the firm with the petitioner but subsequently on physical verification it was found that there was some shortage in the stock for which the petitioner could not give any satisfactory explanation.

10. In this background one has to look to the allegations made in the complaint petition along with the partnership deed which have been annexed thereto. It is alleged in the complaint petition that being the sole working partner and exclusive incharge of the business of the firm the petitioner was entrusted with the properties including raw materials, cash and for that he was to maintain the stock position and cash book showing income and expenditure. He was to deposit the money of the firm in the account of the firm available at Canara Bank. On being asked the petitioner prepared the stock position in respect of the goods available in the month of November, 1996 which showed the articles worth Rs, 12,22,685,70p were present in the stock. However, on physical verification it was found that the stock was available only of amount of Rs. 5,75,555/-and odd. It is alleged that the petitioner being questioned admitted his guilt and assured the complainant either to submit the account or to credit the amount in the firm's account by 2nd week of December, 1996. This period was extended till the end of January; 1997 on being requested by the complainant. In the first week of January, when the complainant tried to contact the petitioner, he was not found present and the firm was found locked.

11. The first deed of 1974 is Annexure-2 to the complaint petition, Clauses 13 and 14 of the said agreement are important for our consideration, which read as follows :

Clause-13:

That no party hereto shall be entitled to withdraw from his account in the Firm, any sum or sums of money exceeding Rs. 8,000/- (Rupees Eight thousand) in aggregate per year without the written consent of the other party hereto.

Clause-14:

That no party shall without the previous consent in writing of the other party hereto will sell, mortgage, or otherwise assign his share or right in the said Partnership business in favour of any person.

12. Admittedly this agreement of 1974 was modified with the consent of the parties giving rise to a fresh agreement dated 27-3-1992. Clause 8(a) of this agreement clearly indicates that the petitioner, Nand Lal Lakhota is a working partner who would be actively engaged in conducting the affairs of the firm. Sub-clause (b) of Clause 8 indicates that Nandlal Lakhota being the work-ing partner will be entitled to salary of Rs. 1000/- per month and the payment of salary to the working partner will be irrespective of profit or loss of the firm. In view of Clause 13 of the agreement the regular books of accounts were required to be maintained and on the close of accounting year a statement of profit and loss shall be prepared and after adjusting all the usual and customary business expenses, the balance of profit or loss would be divided among the partners in proportion to their shares as defined in the deed Clause 14 of the agreement reads as follows :--

That no party shall without the previous consent in writing of the other party hereto will sell, mortgage, or otherwise assign his share or right in the said partnership business in favour of any person.

13. Similarly Clause 15 prohibits either of the parties to enter into any transaction detrimental to commercial interest of the firm except with the consent in writing of the other party. Clause 16 of the agreement goes to show that on behalf of the firm every partner will be entitled to sign on tenders and contract, to receive payment, to draw, accept or endorse bill or cheques in the names of FIRM and to do other lawful act as may be necessary in the interest of the firm and not otherwise by the either party. Clause 18 talks of arbitration in case of any dispute and Clause 19 prohibits either of the parties to lock up the premises of the firm or to suspend the business of the firm or to freeze bank accounts of the firm during the pendency of the decision of the arbitrator or any Court of law.

14. The aforesaid clauses of agreement of 1992 clearly indicate that the petitioner was not only a working partner but. also was a salaried man and he was made exclusive incharge of the entire business of the firm including the stock and the amount.

15. Section 405 of Penal Code defined the term criminal breach of trust. The section reads thus :

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

16. In the instant case it is an admitted fact that by virtue of a fresh deed of 1992 the petitioner was made a working partner and also was getting salary from the firm. He was made sole incharge: of the business and all transactions of the firm were to be carried on by him in the capacity of the working partner.

17. The complainant alleges that the statement regarding stock and its amount was found to be false on physical verification. When the stock was verified it was found that the articles which were available on that date were of Rs. 5,75,555.12 p whereas, according to the statement prepared by the petitioner, the materials in the stock were available of worth Rs. 4,22,625.16p. Thus, according to the complainant, there was less stock of materials found in the firm premises. Moreover, subsequently it was found that the complainant left Patna after locking the firm. The argument of Mr. Jha that being a partner of the firm the petitioner cannot be said to have committed criminal breach of trust and, therefore, it is a case of civil liability only, in my view, does not hold good.

18. In the case of Anil Saran Vs. State of Bihar and another, , practically on similar facts, their Lordships have held that "partnership firm is not a legal entity but a legal mode of doing business by all the partners. Until the firm is dissolved as per law and the accounts settled, all the partners have dominion in common over the property and funds of the firm. Only after the settlement of accounts and allotment of respective share, the partner becomes owner of his share. However, criminal breach of trust u/s 409 is not in respect of the property belonging to the partnership firm, but is an offence committed by a person in respect of the property which has been specifically entrusted to such a person under a special contract and he holds that property in fiduciary capacity under special contract. If he misappropriates the same, it is an offence".

19. From the impugned order it appears that the learned Magistrate has considered the allegations made in the complaint petition as well as terms and conditions of the two deeds of agreement annexed with the said petition. He has also considered the statements of the complainant and his witnesses as well as other documents filed by the complainant. At this stage it cannot be said that by taking cognizance of offence and issuing process against the petitioner the Magistrate has committed any illegality.

20. In the result, I find no merit in this application. It is, accordingly, dismissed.