
(2002) 08 OHC CK 0068
In the Orissa High Court
Case No : Criminal Revision No. 543 of 1996

P.R. Maniktala

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 19-08-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 305, 305(3), 305(5), 465
Penal Code, 1860 (IPC) — Section 405, 406

Citation : (2002) 08 OHC CK 0068

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : Bibhudendra Mishra, B.K. Nayak, J.K. Khuntia, S.S. Patra, B. Misra, R. Roy, K.K. Jena, T. Roy and L. Roy, in Criminal Revision No. 543 of 1996 and Indrajit Ray, B.K. Nayak and J.K. Khuntia, in Criminal Misc. Case No. 503 of 1996, for the Appellant; Sanjit Mohanty, for the Respondent

Judgement

P.K. Mohanty, J.—Both the petitions involve common question of law and facts and as such on the request and consent of the Learned Counsel for the parties they were heard analogous and are being disposed of by this common judgment.

2. The prosecution case in short is that the Petitioner Doaba Industrial and Trading Company (Pvt.) Ltd. (hereinafter called "DITCO") entered into a contract with M/s. National Aluminium Company Limited (hereinafter called "NALCO") to look after the export of their aluminum ingots during the year 1991-93 as their clearing and forwarding agent (C&F) agent. NALCO authorised Petitioner-company to receive the materials stocks and maintaining accounts regarding receipt, discharge, and balance of the stock of aluminum ingots, despatched through the Paradeep Port. According to special condition of the contract, OITCO was required to take necessary precautions to ensure safety of materials and keep proper accounts. A security contract was also entered into on 15.11.1993 with effect from 1.6.1993 to meet the expenses of security arrangements, the CBI registered a case on 18.8.1994 on source information that M/s. OITCO and M/s. Marine Consultants conspired together and in furtherance of the conspiracy

misappropriated aluminium ingots worth Rs. 32.7 lakhs. Investigation was conducted and charge-sheet was submitted against M/s. OITCO and Sri. P. R. Maniktala its Director-cum-General Manager u/s 406. I.P.C. on 31.3.1995. It is the prosecution case that the Petitioner-company had received standard aluminum ingots of 13259920 Metric tonnes 8068.27 Metric tonnes of sow ingots. But on 4.9.1993 when the check of stock position was made it was found that there have been shortage of 52.809 metric tonnes of ingots valuing Rs. 32.7 lakhs. The DITCO having acknowledged receipt of total material they were liable to shortage of aluminium ingots entrusted to it by NALCO. Charge-sheet was filed by the C.B.I. as against the Petitioners u/s 406, I.P.C. and the learned Additional Chief Judicial Magistrate. Bhubaneswar took cognizance of the offence thereunder. The Petitioners then filed a petition for recall of the order of cognizance, but that having been dismissed, the present petitions.

3. Sri Indrajit Ray, learned Senior Advocate appearing for the Petitioner in Criminal Misc. Case No. 503 of 1997 and Sri Bibhudendra Misra, learned-Senior Advocate appearing for the Petitioner in Criminal Revision No. 543 of 1996 submitted that a mere perusal of the order dated 31.7.1995 annexed as Annexure-15 to the Criminal Misc. case passed by the learned Additional Judicial Magistrate would go to show that he having perused the F.I.R. and Charge-sheet took cognizance of the offence u/s 406. I.P.C. and consequently directed issuance of process against Sri P.R. Maniktala. Thus, the Court has not taken any cognizance as against -accused Petitioner No. 1 OITCO. No appeal or revision having been preferred against such order by the prosecution, the matter rests at that stage and accordingly, the OITCO has gone out of the arena of prosecution ho cognizance having been taken -against it. The next submission of the Learned Counsel is that a bare perusal of the F.I.R., the statements of witnesses recorded u/s 161., Code of Criminal Procedure and the papers produced by the prosecution would go to show that there is no material as against the Petitioner P.R. Maniktala to rope him in the crime and as such, the order of cognizance and subsequent order rejecting his application for recalling the order of cognizance is bad in law and liable to be set aside.

4. In order to appreciate the first submission of the Learned Counsel with regard to the order of cognizance, as against the Petitioner No. 1 DITCO a look at the order of cognizance passed by the learned Additional Chief Judicial Magistrate may be made. In order dated 31.7.1995, the learned Magistrate has noted "perused the F.I.R. and the Charge Sheet. Cognizance u/s 406, I.P.C. against accused P.R. Maniktala is taken. Issue summons to the accused fixing 13.9.95 for appearance". The accused persons named in the case were Accused No 1. Doaba Industrial and Trading Co. (Pvt.) Ltd. and accused No. 2 Sri P.R. Maniktala. The order dated 16.1.1995 reflects that in response to summons, accused P.R. Maniktala for self and for accused No. 1 as its General Manager appeared in Court and tiled and application for bail and he was allowed bail. Further, the order dated 28.10.1996 of the learned Additional Chief Judicial Magistrate on the application of the Petitioners for discharging/recalling the order cognizance

clarifies the position that DITCO is the Company which has conducted all dealings with the NALCO and it being a Company, in view of Section 305, Code of Criminal Procedure is to be represented properly by its representative and as such, accused No. 2 P.R. Maniktala is added as an accused. The Magistrate while taking cognizance on perusal of police papers has to apply his mind properly and judiciously. It is the settled position of law that cognizance is taken of an offence and not against an offender, but it appears that while taking cognizance of the offence, the learned Additional Chief Judicial Magistrate record that cognizance u/s 406, I.P.C. is taken, against accused P.R. Maniktala intending therein that cognizance of offence is taken, and since the first accused is the Company and second accused P.R. Maniktala, its Director-cum-General Manager, summons be issued in his name". The submission of the Learned Counsel that no cognizance has been taken of the offence as against the Company thus cannot be accepted in the aforesaid premises. A perusal of the F.I.R. submitted by the C.B.I., the accompanying statement recorded u/s 161. Code of Criminal Procedure during investigation, the Charge Sheet and the documents, clearly makes out a case u/s 406, I.P.C. as against the DITCO, and it has been held so by the learned Additional Chief Judicial Magistrate, in his order on the application for recall of the -order of cognizance and as such, otherwise allow, the contentions raised merits no consideration. However, it may be mentioned here that Sri Sanjit Mohanty, learned Senior counsel, appearing for the C.B.I. submitted that this defect may be an irregularity and not an infirmity vitiating the Criminal Proceeding. The Learned Counsel has referred to Section 465., Code of Criminal Procedure in support of his contention and cited the decision of the Apex Court in State of Madhya Pradesh Vs. Bhooraji and Others, . wherein their Lordships have held that error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal Courts, unless such error/omission or irregularity has occasioned a failure of justice, the superior Court, shall not quash such proceeding on that ground alone. The Apex Court in A.C. Sharma Vs. Delhi Administration, has laid down that irregularity not affecting course of justice, should not be interfered with. Be that as it may. since the defect in the wordings of the order, as pointed out has already been held and I am of the opinion that such is a defect in the language and manner of expression by the learned Additional Chief Judicial Magistrate, I need not further delve into that point, specially at this stage of an application u/s 482., Code of Criminal Procedure for quashing the order of cognizance.

5. Now let me consider the second submission of the Learned Counsel with regard to the order of cognizance as against P.R. Manikatla the Director-cum-General Manager of the DITCO. The Learned Counsel has strenuously and emphatically referred to the counter/reply of the prosecution (C.B.I.) dated 24.9.1996 filed in response to the application of the Petitioner for recalling the order of cognizance and submitted that in terms, the C.B.I. in its counter has stated that since DITCO has committed criminal breach of trust and failed to

account for the aluminum, the accused No. 2 P.R. Manikatla has been arrayed as accused in the Charge-Sheet since he being the Director of the DITCO, has authorised his agent, who are posted at Paradeep to take necessary action in regard to the aforesaid contract work and resolution of the Board of Directors was signed by the accused No. 2. The DITCO having received the materials failed to account for the same and as such is liable u/s 406, I.P.C. Reference has also been made to the order of the learned Additional Chief Judicial Magistrate dated 29.10.1996 annexed as Annexure-7 to the Criminal Revision and it is urged that a perusal of paragraph-8.9 and 10 of the order would make it abundantly clear that there is no doubt that one J.K. Madiratta and A.P. Jains were the persons working as the Manager and Assistant Manager respectively of DITCO at paradeep and were receiving the aluminium ingues sent by NALCO to DITCO and they were also in charge of and the custodian of the goods so receive by them. In view of such clear finding the learned Magistrate could not have held P.K. Maniktala to have committed an offence contemplated u/s 406, I.P.C.

6. In order to appreciate the contention of the Learned Counsel, it is necessary to refer to the provision of Sections 405 and 406 of the Indian Penal Code which may be profitably quoted hereunder:

405. Criminal breach of trust: Whoever, being in any manner entrusted. with 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."

406. Punishment for criminal breach of trust; Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Thus, the ingredients of the aforesaid provisions for holding a person responsible for an offence under the aforesaid Section, are (a) The accused must be entrusted with property or with dominion over the property; (b) The person so entrusted must dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation of any directions of law prescribing the mode in which such property is to be discharged or any legal contract made touching discharge of such trust. Thus, "entrustment" as used in the section is of importance, unless there is entrustment there can be no offence against that person. The word "entrustment" in its generic sense means handing over possession of a thing for some purpose which may not imply the conferring of any property right, as such, entrustment may be in any manner. It requires that the accused should receive the property and hold it on behalf of Anr., so that he should be a trustee of the property and to constitute an offence, the act should be done deliberately, intentionally and not by accident or inadvertence. Mere

entrustment with the property or with dominion over the property without showing further that such property was dishonestly misappropriated or converted to his own use shall not bring home the offence u/s 406, I.P.C.

7. In *Managing Director, ITC Agrotech Ltd. Vs. Sri Purna Chandra Mishra and Another*, this Court while considering the liability of the Director or the Managing Director in a food adulteration case and taking the conspectus of the decision of the Apex Court on the point, took the view that there can be no general presumption that only because a person is a Director or the Managing Director of the Company, he fulfils the requirement of the offence to make him liable. Vicarious liability of a person for prosecution of an offence under the Food Adulteration Act by a Company arises if at the material point of time he was in charge of and also responsible to the Company for the conduct of the business.

In *State of Haryana v. Brijlal Mittal and Ors.* (1998) 5 S.C.C. 543, the Apex Court held that simply because a person is a Director of the Company it does not necessarily mean that he fulfils both the above requirements so as to make him liable, actually for its day to day business. The prosecution has to prove that the accused was responsible to the Company for its day to day business. The Apex Court in the case of *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, observed that only on the basis of the allegations of the complainant that the Appellants therein had given their brand name to "Residency Foods and Beverages Ltd." for bottling the beverage "Leher Pepsi" without showing the role of the Appellant in the manufacturing of the beverage which is said to be adulterated, the accused person could not be proceeded against and as such, the prosecution could be quashed in exercise of inherent powers of the Court u/s 482. Code of Criminal Procedure i *Rajkishore Bhuyan Vs. The State*, this Court has taken the view that a person authorised to collect the dues, might delegate his function to a subordinate of his, and in such a case that subordinate also gets a legal right to collect and when he acts in exercise of such delegated authority any amount that is paid to him. would constitute "entrustment" within the meaning of Section 405. I.P.C. the Court was considering the case of a *Nayab Tahasildar*, who was authorised to collect the rent, but in view of the practice authorised, the *Moharir* to collect such rent. The collections made by the *Moharir* in the circumstances was held to be in exercise of the impliedly authority and the payment to the *Moharir* constitutes entrustment.

In *R.K. Dalmia and Ors. v. The Delhi Administration* AIR 1962 S.C. 1921, the Apex Court, while considering the liability of the Director of a Company in a case of breach of trust held that where one partner is given authority by the other partners to collect moneys or property of the firm he is entrusted with dominion over that property, and if he dishonestly misappropriates it, then he comes within Section 405. I.P.C.

In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, the Apex Court while considering the liability of Director vis a vis a Manager held that the

Manager of the Company, who is directly in charge of its affairs, could not fall in the same category as the Director, since it could not be reasonably argued that no case is made out against the Manager because from the very nature of his duties, it is manifest that he must be in the knowledge about the affairs of the sale and manufacture of the disputed sample. From the very nature of his duties it can be safely inferred that the Manager would undoubtedly be vicariously liable for the offence.

8. Now coming to the facts and materials on record of his case, there is no dispute that the Petitioner No. 1 M/s. Doaba Industrial and Trading Co. (Pvt.) Ltd (DITCO) was appointed as carrying and forwarding agent by the National Aluminium Company (NALCO) for export of alluminium inguts through Paradeep Port and M/s. Marine Consultants and Surveyors Ltd. was appointed for survey in the export regarding unloading of the ingots from trucks at Paradeep, verify the number of ingots conditions of packing, preparation of Tally sheets and send the report to NALCO. There is also no dispute that Sri. P.R. Maniktala was one of the Directors and the General Manager of DITCO and till end of July, 1993, DITCO received standard alluminium ingots of 1325920 Metric Tonnes (M.Ts) and 8068.27 M.Ts. of Sow ingots and as having a balance of 72 pieces. On verification of the stock position a shortage of 52.809 M.Ts. were detected on 4.9.1993. It is also not in dispute that the Drivers of trucks carrying the ingots from NALCO were signing in the invoice acknowledging, receipt of materials, the authorised representatives of Petitioner Company DITCO were receiving the materials from the trucks and acknowledging the receipt of the materials.

9. It is the statement u/s 161, Code of Criminal Procedure as revealed from the impugned order of Sri V.M. Mangaraju, the Area Manager, Orissa Transport Pvt. Ltd. that one J.K. Mediratta of DITCO, had authorised their representatives, N.K. Dhal, J.K. Bari and R.C. Prusty to receive and acknowledge the consignments of ingots from NALCO. Subsequently on 30.3.1993, DITCO authorised A.P. Janes and K.V.R. Murty to acknowledge the unloading of alluminium ingots and they had accordingly acknowledged the receipt of such ingots from their trucks. It is also the statement of one Bhagaban Mohapatra, working as Supervisor in Karami Thapper Company (K.C.T.) at Paradeep that K.C.T. and DITCO are sister concerns of the said Company and are looked after by Sri J.K. Mediratta and he himself, A.P. James and S.K. Nayak.were checking the trucks carrying ingots to Paradeep. He has also narrated the details and manner in which the materials were being unloaded. The statement of Sri A.P. James working as Assistant Manger of K. T. C. reveals that his company and DITCO are business associates and one group of business associates. He was asked to work for the DITCO which he was doing.

10. The learned Additional Chief Judicial Magistrate in the impugned order has found that at no point of time accused, P.R. Manikatala was remaining physically present at Paradeep and that since the representatives of DITCO were acknowledging the receipts on behalf of the Company, the Company,- DITCO is responsible for the acts committed by its representatives., rightly so. However in

view of Section 305. Code of Criminal Procedure since the company being an accused and is to be represented by someone and accused No. 2 is a Director and General Manager, the learned Magistrate thought that he should be added as an accused.

Section 305 of the Code of Criminal Procedure may be quoted hereunder:

305. Procedure when corporation or registered society is an accused. - (1) In this section "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act. 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint representative for the purpose of the inquiry or trial and such appointment need not be under the seal of {he Corporation.

(3) Where a representative of a Corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined, shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in Sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the Managing Director of the Corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the-statement has appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

In view of the aforesaid provision where the Corporation is an accused person in an, inquiry or trial it may appoint a representative for the purpose of inquiry or trial and where a representative appears the requirement of the Code that anything may be done in presence of the accused shall be construed as a requirement that things shall be dona in presence of the representative and the requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined. The Company is also in view of Sub-section (5) authorised to give a statement in writing signed by the Managing Director or any person having or being one of the person having the management of the affairs of the Company to the effect the the person named as

the representative of the Company, the Court shall presume that such person has been appointed. In such view of the matter, if the DITCO was found to be an accused, the process could be sent to the Company which is a legal entity and the Company could nominate its representative But solely on the ground that the Company as an accused, the learned Additional Chief Magistrate could not have through of admitting the Director and General manager of the Company as being the Company for the purpose of prosecution and issued process Be that is if may on a reading of the F.I.R. statements of the witnesses recorded u/s 161, Code of Criminal Procedure and the materials placed, it cannot be said that the accused P.R. Maniktala who was one of the Directors of the Company, DITCO and also the General Manager, by virtue of such position was liable for the offence alleged u/s 406, I.P.C. As has been held by the Apex Court in several judgments referred to in the foregoing paragraphs and the judgments of this Court, no one can be held responsible for the offence committed by the Company solely because he is the Director. There is no allegation or even a whisper in the F.I.R./ Charge sheet and the statements recorded u/s 161, Code of Criminal Procedure that said Sri P.R. Maniktala was entrusted with the property or with dominion over the property and he dishonestly misappropriated or converted it to his own use or dishonestly used or disposed of that property or wilfully suffered any other person to do so in violation of any direction of law prescribing the mode in which such property is to be discharged. To constitute criminal breach of trust, there must be entrustment there must be misappropriation or conversion to use or his own use of such property in violation of any legal direction or of any legal contract and the misappropriation or conversion must be with dishonest intention. The requirement of the section further is that the accused should have received the property and held it on behalf of Anr. so that he should act as trustee of the property. To constitute Criminal breach of trust the act should be done deliberately, intentionally and not by accident or inadvertence. In absence of any such material, the order of cognizance taken against Petitioner No. 2-P.R. Maniktala in the impugned order only because he is a Director or General Manager of the accused Company without anything more, the order cannot be sustained in law and has to be quashed and so it is ordered.

11. Sri Indrajeet Ray, learned Senior Advocate for the Petitioner made an attempt to persuade the Court that, in terms of the Arbitration clause in the agreement between the parties, the matter could be referred to arbitration for deciding the liability of the Petitioner Company, if any, on the materials available on record and as such, the Criminal proceedings is misconceived and otherwise not maintainable in law. No legal provision has been cited in support of such submission and therefore, I am not inclined to entertain the plea and delve into such question at this stage of the proceeding.

12. In view of what has been held and observed and that the accused is a company, it is open to it to nominate its representatives in terms of Section 305, Code of Criminal Procedure for the purpose of the case, inasmuch as, since it had to and acted through its agents/officers in dealing with the transactions with the

other company, NALCO. during which the alleged offence is said to have been committed, the prosecution is free and at liberty in any stage of the proceedings to produce materials, if any. that any other person who has not been arrayed as an accused or the present accused as against whom the prosecution has been quashed, also committed the alleged offence and if it satisfies the trial Court in that regard, the learned trial Court can take cognizance and proceed as against such persons and try them along with the remaining accused person. However, it need not be emphasized that it is for the learned trial Court to take a decision in the matter, in accordance with law on the basis of materials placed before it in the event it is so done by the prosecution. It is made clear that, the fact that the prosecution as against Sri. P.R. Maniktala has been quashed by this Court would not stand on the way of the learned Court below from exercising such discretion, if it is satisfied from materials placed before it at a subsequent stage that a case for taking cognizance and to proceed as against him is made out.

In the result, both, the Criminal Misc. Case No. 503 of 1997 and Criminal Revision No. 543 of 1996 are allowed in part to the extent indicated.

The lower Court records be transmitted immediately.