
(2012) 07 BOM CK 0027

In the Bombay High Court

Case No : Criminal Revision Application No's. 450-452 of 2007

Pramod Parmeshwarlal Banka and Others

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 156(3), 200, 482
Penal Code, 1860 (IPC) — Section 114, 34, 405, 406, 409

Citation : (2013) 1 BomCR(Cri) 347

Hon'ble Judges : Gavai B.R., J

Bench : Single Bench

Advocate : Shashank V. Manohar with Shyam Dewani, Vikrant Sahane, Vipul Jain instructed by LP. Bagaria, for the Appellant; S.S. Pednekar and A.S. Shitole, Assistant Public Prosecutor, for State and Zal Andhyarujuna with Devendra Chandan instructed by . Vivek M. Sharma, for the Respondent

Judgement

Gavai B.R., J.—All these three revision applications challenge the order dated 24th August 2007 passed by the learned Additional Sessions Judge, Mumbai in Criminal Revision Application No. 529/2007 thereby allowing the revision filed respondent No. 2 herein and setting aside the order passed by the learned Additional Chief Metropolitan Magistrate, 40th Court, Girgaon, Mumbai whereby learned Magistrate had discharged the accused No. 1 Pramod Banka and accused No. 4 Rani Agarwal. By the impugned order the learned Revisional Court has also directed to frame charge u/s 409 of Indian Penal Code (I.P.C.) against accused No. 2 Vijay kumar Agarwal. The Apex Court by its order dated 11th May 2011 has directed the present revisions to be disposed off within a stipulated period. As such 1 had heard the learned Counsel for the parties at length on 4th and 5th July 2011. However, noticing that on an earlier occasion the parties had agreed to settle the matter, as could be reflected from the order passed by Hon'ble Justice Bhatia on 24th March 2011, I thought it appropriate to give one more opportunity to the parties to explore the possibility of settlement. Accordingly, matter was adjourned to 11th July 2010. On 11th July 2011, at the request of

the parties, the matter was again adjourned to 19th July 2011. However, since on 19th July 2011, the learned Counsel for respondent No. 2 expressed his client's unwillingness to settle the matter, I had pronounced the order in the Court thereby making rule absolute in terms of prayer Clause (a).

2. The facts giving rise to the present revisions applications are as under.

3. The respondent No. 2 complainant has filed a criminal complaint before the learned Magistrate. In nutshell, the case of the complainant is as under.

4. That the accused No. 1 Mr. Pramod Banka was President (Finance); accused No. 2 Mr. Vijay kumar Agarwal was the Director; accused No. 3 Mr. Naval Sharma (subsequently dropped) was Executive (Finance) and accused No. 4 Rani Agarwal was the authorised signatory of a public limited company, namely, Creative Outerwear Limited (hereinafter referred to as "COL" for short). It is the case of the complainant that the complainant was in need of Rs. 50 lakh. It is his case that through one financial consultant, namely, Miss Anjali Malik, the complainant came in contact with accused No. 2 Vijay kumar Agarwal. Said Vijay Kumar approached the accused and requested to advance him an amount of Rs. 50 lakh for a short period. It is the contention of the complainant that after deliberations, the accused No. 2 Vijay kumar Agarwal consented to advance an amount of loan to the complainant in lieu of security of 19,000 shares of a company Sesa Goa Limited, which shares were owned by the complainant. Accordingly, an agreement was entered into between the parties. A cheque of Rs. 50 lakh was given to the complainant on 21st August 1995. It was agreed between the parties that the said loan was to be repaid within a period of six months along with interest at the rate of 27% per annum. It is the case of the complainant that the cheque was handed over to the complainant at his residence and, at the same time, he entrusted 19,000 shares valued at Rs. 400/- each having cumulative value of Rs. 76 lakh by way of security. That a memorandum was entered into on 22nd August 1995. It is further case of the complainant that though the complainant repaid the loan along with interest by the bankers cheque, out of 19,000 shares pledged with them, the accused returned to him only 15,000 shares and retained 4,000 shares with them. It is his further case that in spite of repeated and regular correspondence with the accused, the shares have not been returned to him. It is his further case that accused No. 4 Rani Agarwal got 4,000 shares transferred in the name of COL. The complainant, therefore, filed a criminal complaint alleging that the shares which were entrusted in the custody of accused persons were not returned by them, as such, they committed an offence u/s 406 read with section 114 of I.P.C.

5. The evidence of the complainant before the charge was recorded. After considering the evidence of the complainant the learned Magistrate found that no case was made out for proceeding against accused No. 1 Pramod Banka; accused No. 3 Naval Sharma and accused No. 4 Rani Agarwal and, as such, directed that the said accused shall stand discharged. However charge u/s 406 of I.P.C. was directed to be framed against accused No. 2 Vijaykumar Agarwal. Being

aggrieved by the said order, a revision was filed by the complainant. It appears that during the pendency of the said revision, accused No. 3 Naval Sharma was deleted from the array of accused and the revision. The learned Sessions Judge allowed the revision of the complainant and, while setting aside the order of discharge as against accused No. 1 Pramod Banka and accused No. 4 Rani Agarwal, directed the learned Magistrate to frame charge against all the accused for the offence u/s 409 read with section 34 of I.P.C. Being aggrieved thereby, the present revisions came to be filed.

6. Shri Manohar, learned Counsel appearing on behalf of the applicants submits that the transaction in question was purely of a civil nature. He submits that even as per the agreement, if the loan was not repaid within a stipulated period, the COL was entitled to encash the shares and adjust the same towards the repayment of loan. He submits that, admittedly, the loan was not repaid by the complainant within a stipulated period. It is submitted that as per the agreement dated 22nd August 1995 the loan as to be repaid by 22nd February 1996. It is, however, submitted that the complainant has repaid the loan on 7th March 1996 and 22nd April 1996. He submitted that the interest was paid on 1st July 1996. It is further submitted that 15,000 shares were returned in June 1996 itself. It is, however, submitted that there was another parallel transaction between COL and the sons of the complainant, namely, Mr. Shailesh Bajaj and Mr. Rahul Bajaj. It is submitted that since they had defaulted in repayment, the remaining 4,000 shares were retained as security towards the said loan. Learned Counsel for the applicant submits that admittedly the transaction was between the complainant and the company COL. He submits that the applicants cannot be made vicariously liable for the offence committed by the company. It is further submitted that the ingredients to constitute the offence u/s 406 were also not available. It is, therefore, submitted that there was no reason for the Revisional Court to reverse the well reasoned order of the trial Court.

7. Mr. Andhyarujina, learned Counsel for the respondent No. 2, on the contrary, submits that the charge u/s 409 has rightly been framed on the accused persons. He submits that so far as accused No. 4 Rani Agarwal is concerned, she was an authorised signatory who has, in fact, transferred the shares. It is submitted that she is also director and substantive shareholder who is interested in the profits of the company. It is submitted that the said accused is working woman and being wife of accused No. 2 was aware of all the facts and, therefore, she cannot be permitted to escape the criminal liability. He submits that so far as accused No. 1 Pramod Banka is concerned, he is the President (Finance) and that he is involved in the transaction since the beginning. Learned Counsel relied upon certain signatures of the said applicant on certain pleadings in respect of civil litigation between the parties. He submits that since he was involved in the transaction at every stage he also cannot be allowed to escape the criminal liability. Mr. Andhyarujina relies upon the judgments of the Apex Court in the case of Jaswantrai Manilal Akhaney Vs. The State of Bombay, and in the case of R.K. Dalmia Vs. Delhi Administration, .

8. For appreciating the rival submissions, it would be necessary to refer to sections 405, 406 and 409 of I.P.C. which read thus:

405. Criminal breach of trust.

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 willfully suffers any other person so to do, commits "criminal breach of trust".

Explanation....

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.

409. Criminal breach of trust by public servant, or by banker, merchant or agent.

Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

9. We will first deal with the cases of accused No. 1 Pramod Banka and accused No. 4 Rani Agarwal. In this respect it will be relevant to refer to some paragraphs of examination in chief or the evidence before charge of the complainant which read thus:

1. I am M. Com. I have a business of investment in shares and Trading in shares, for about 15 years. I know all the accused. The accused No. 1 is the President of Creative Outwear Ltd. He looks after the finance. The accused No. 2 Vijay is the Promoter and Director of Creative Outwear Ltd.. The accused No. 3 Naval Sharma look after the accounts of Creative Outwear Ltd.. The accused No. 4 Rani Agarwal is the wife of accused No. 2 Vijay and authorised signatory of Creative Outwear Ltd.

2. I was a need of some amounts in the month of August, 1995. I contacted one Miss Anjali Malik who was working in Fiduciary, capital and Financial services Ltd.. She said to me that the accused No. 2 Vijay can give the money against the shares. She arranged a meeting between me and accused No. 2 Vijay in the month of August, 3rd week 1995 at Gamdevi, Darul Muluk, 7th floor, Flat No. 73, Mumbai 7.

3. A meeting took place between myself, accused No. 2, Vijay and Miss Anjali Malik as per previous arrangement. My 2 sons Shailesh & Rahul were also

present during the meeting. It was agreed in the meeting that I should signed on an agreement, pledge 19,000 shares of "Sesa" Goa Ltd. with creative outwear Ltd. and the accused No. 2, Vijay will advance a loan of Rs. 50 lacs to me at the rate of 27% p.a. interest, repayable on the expiry of 6 months. We signed an agreement on 22/8/1995 at my residence Darul Mulukh, 7th Floor, Flat No. 73, Gamdevi, Mumbai 7. I had given 19000 shares in the custody of Miss Anjali Malik of 21st August, 1995. The accused No. 2 gave me a cheque for Rs. 50 lacs on 22/8/1995 at my said residence.

From the evidence of the said witness, it would be clear that it is the complainant who was in need of amount in the month of August 1995. It is the complainant who contacted one Miss Anjali Malik who was working in Fiduciary, Capital and Financial Services Ltd. According to the complainant, it is the said Anjali Malik who told him that the accused No. 2 Mr. Vijay kumar Agarwal can give money against the shares and, accordingly, she arranged for a meeting of the complainant and accused No. 2 Vijaykumar Agarwal in the third week of August 1995 at the residence of the complainant. As per the complainant himself it is only the complainant, accused No. 2 Vijaykumar Agarwal, Miss Anjali Malik and two sons of the complainant, namely, Shailesh and Rahul who were present in the meeting. It was agreed in the meeting that the complainant shall sign a document pledging 19,000 shares of Sesa Goa Ltd. with COL and accused No. 2 shall advance a loan of Rs. 50 lakh to him. According to the complainant, the agreement was signed on 22nd August 1995 at his residence. According to him, he had given 19,000 shares in the custody of Miss Anjali Malik on 21st August 1995 and he received the cheque on 22nd August 1995 from accused No. 2 Vijaykumar Agarwal. It can, thus, be clearly seen that even according to the complainant's own evidence, the accused No. 1 Pramod Banka and accused No. 4 Rani Agarwal were not at all involved in the transaction that took place between the complainant and accused No. 2 Vijay Agarwal. Even the perusal of the agreement would reveal that the agreement has been entered into between the complainant and accused No. 2 Vijay Agarwal for COL. It can further be seen that P.W.-2 and P.W.-3 who are the sons of the complainant have also given the same version in their evidence before charge, who were also present in the meeting between the complainant and accused No. 2 Vijaykumar Agarwal. It is to be noted that even according to the complainant, out of 19,000 shares, 15,000 shares were already returned to him.

10. The learned Magistrate, on the basis of the evidence which was led on behalf of the complainant himself, came to the conclusion that the shares had been entrusted only to accused No. 2 Vijay Agarwal and, therefore, found that there was a prima facie case only against accused No. 2 Vijay Agarwal. Learned Magistrate has also come to the finding that the transaction entered into by accused No. 2 with the complainant was not in his personal capacity but as a Director of COL. It can, thus, be clearly seen that learned Magistrate finding that there was no evidence against other accused, by a reasoned order has discharged the said accused i.e. accused Nos. 1 and 4. However, the learned

Revisional Court on the premise that the accused who are acting as Directors and Managers of the company had signed some of the correspondence issued to the complainant on behalf of the company, has come to a conclusion that the said accused were liable to face criminal prosecution. Learned Revisional Court observed that the activities showed that they acted in consultation with each other. It is further observed that there was no question of common intention or similar intention in the corporate world and that the Companies Act under the deliberation of the directors and the managing staff. Learned Revisional Court further held that the prime intention remains only to earn profit and share the same. Learned Revisional Court, therefore, found that the transaction was not a personal transaction between accused No. 2 and the complainant but has held that the evidence discloses that the transaction was between COL and the complainant and, therefore, other accused being the Directors and the Officers of the company were liable to be prosecuted and, as such, set aside the well reasoned order passed by learned Magistrate.

11. In any case, it is further to be noted at this stage that the complainant himself had addressed a letter to the applicant Pramod Banka on 22nd March 1995 requesting to send the shares for transferring to the company i.e. COL since the book closure was from 6th of September 1995 to 9th of September 1995.

12. The findings of the Revisional Court, in my considered view, apart from the fact that it was based on conjectures and surmises, are totally in ignorance of the law laid down by the Apex Court in this respect. Though, initially, the company was not joined as an accused, a statement has been made at bar by the learned Counsel for respondent No. 2 that subsequently an application was made to the learned trial Court and the company was also impleaded as an accused.

13. In the case of S.K. Alagh Vs. State of U.P. and Others, , the Managing Director of Britannia Industries was sought to be prosecuted for the offence punishable u/s 406 of I.P.C. alleging that the company had neither sent the goods nor returned the money. The Apex Court observed thus:

19. Ingredients of the offence u/s 406 are :

(1) a person should have been entrusted with property, or entrusted with dominion over property;

(2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;

(3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

20. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence u/s 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. See *Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya*, .

14. Further in the case of *Maksud Saiyed Vs. State of Gujarat and Others*, ; wherein a Chairmancum Managing Director of Dena Bank and its Directors were being prosecuted u/s 500 of Cr.P.C. an order under sub-section (3) of section 156 of Cr.P.C. was passed by learned Judicial Magistrate. The Chairman and other Directors filed application u/s 482 of Cr. P.C. The same was allowed by the High Court. The complainant went in appeal before the Apex Court. Upholding the view of the High Court, the Apex Court observed thus:

13. Where a jurisdiction is exercised on a complaint petition filed in terms of section 156(3) or section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

(emphasis supplied)

A similar view has been taken by the Apex Court in the case of *Keki Hormusji Gharda and Others Vs. Mehervan Rustom Irani and Another*, .

15. In this view of the settled legal position, I am of the considered view that the learned Revisional Court has grossly erred in reversing the order of discharge in so far as applicants Pramod Banka and Rani Agarwal are concerned, which was passed by learned Magistrate on the basis of material placed before him. The learned Magistrate has rightly held that there was no material to proceed against other accused other than accused No. 2 Vijay Agarwal. I have already reproduced relevant part of the examination-in-chief, in the evidence of the complainant before charge. From the said evidence it reveals that there was no role at all played by other accused except accused No. 2 Vijay Agarwal. The learned Revisional Court on erroneous assumption held that since the transaction was between the complainant and the company, all the directors and officers of

the company were liable to be prosecuted. As such, in my considered view, the Revisional Court has patently erred in law. The view taken by the learned Revisional 23/13(1) Court is totally in ignorance of the law laid down by the Apex Court on the issue that unless there is specific provision in the statute the Directors of the company cannot be prosecuted on account of vicarious liability. The facts of the present case are most identical with that of S.K. Along (cited supra).

16. That leaves me to next question, as to whether the order of the learned Revisional Court framing charge u/s 409 of I.P.C. was sustainable.

17. The learned Revisional Court has found that the charge u/s 409 was tenable since, though the accused were not bankers or the public servants, they would fit in the category of factor. The "factor" has been defined in Law Lexicon as under:

A factor is a mercantile agent who, in the customary course of his business as such agent, is entrusted with the possession or control of goods, wares, or merchandise for sale on commission. An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation commonly called "factorage" or "commission".

18. It is the case of the complainant himself that the shares were given as security towards the amount which he had received by way of loan. The learned Revisional Court in support of its finding as to how section 409 is applicable has observed thus:

16. ...When the shares were pledged to Col it was accepted as receivable account on the condition that if the complainant fails to repay the loan along with interest the COL was free to sell or deal with the shares as if they were COL's property. Had the share been with accused for more than a year the accused would have been entitled to receive the benefits on account of dividend. Therefore, in my opinion it was receivable account which was pledged as security of the loan and thus Col becomes factor as per the definition of factor as envisaged by section 409 of I.P.C.

According to learned Revisional Court, since it was agreed that if the complainant fails to repay the loan amount along with interest, the COL was free to sell or deal with the shares as if it was their property and had the shares been with the accused for more than a year the accused would have been entitled to receive benefit on account of dividend, the same comes within the definition of "factor" as envisaged u/s 409 of I.P.C. In my considered view, the reason given by learned Revisional Court is a far fetched reasoning. The same is based only on conjecture and surmises. Since even according to the complainant, shares were given only as a security, by no Stretch of imagination it can be held that the accused were an agent, employed by the complainant, to sell goods or merchandise, entrusted to them for compensation called a "factorage" or "commission".

In the above view of the matter, in my considered view, the learned Revisional Court has grossly erred in interfering with the well reasoned order passed by learned Magistrate. Rule is, therefore, made absolute in terms of prayer Clause (c).