(2008) 05 CAL CK 0053

In the Calcutta High Court

Case No : C.R.R. No. 3610 of 2007

Salim Makkar — APPELLANT

Vs

The State of West Bengal and Another — RESPONDENT

Date of Decision : 16-05-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173
Penal Code, 1860 (IPC) — Section 405, 406, 430

Citation : (2008) 05 CAL CK 0053

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Joymalya Bagchi and Kallol Mondal, for the Appellant;

Final Decision : Dismissed

Judgement

Ashim Kumar Roy, J.—The petitioner seeking quashing of the First Information Report relating to Tiljala Police Station Case No. 238/07 dated August 3, 2007 under Sections 406/430 of the Indian Penal Code corresponding to BGR Case No. 2820 of 2007, now pending before the Learned Additional Chief Judicial Magistrate, Alipore, South 24-Parganas, moved the instant criminal revision, invoking the inherent jurisdiction of this Hon?ble Court.

2. The case of the complainant as it appears from the face of the allegations contained in the impugned First Information Report are as follows:

The complainant who is an Electrical Engineer was approached by the accused persons and was proposed by him to start a business by forming a Private Limited Company where the ratio of investment would be 47.5% each by the complainant and the accused Salim Makkar and balance 5% by Mrs. Makkar. The accused allured the complainant by a wrongful representation that he would bring huge quantity of export order from the overseas countries. Believing such representation the accused agreed to such proposal and a Private Limited Company under the name and style of Presto Animation Studio Pvt. Ltd. having its registered office at B/29/H/6, Canal South Road, Kolkata 700 105 was incorporated. By a mutual arrangement the accused person was in-charge of sale, purchase and accounts in a fiduciary capacity whereas the complainant being a technical person was in-charge of manufacturing process. The company owned and possessed several sophisticated machinery and other accessories worth of Rs. 20 lakhs. The accused inspite of repeated demand of the complainant refused to furnish the accounts of the business on one pretext or other. During the month of November, 2006 due to some personal reason the petitioner was out of Kolkata and when the accused was in-charge of entire business and the books of account, cash, bank and cheque books were in his custody in a fiduciary capacity. The complainant after returned to Kolkata has found the accused has removed all valuable properties of the company viz. (i) 12 computer workstations. (ii) Speakers, (iii) Sony FXI Camera. (iv) 2 Tripods. (v) Sony Handycam. (vi) Pioneer DVD Player. (vii) Cash Book. (viii) Cheque Book. (ix) Accounts Book. (x) Sony T.V. (xi) Pass Book. (xii) Air Conditioner. (xiii) Chairs. (xiv) Tables. (xv) and many other valuable articles.

3. The quashing of the impugned FIR has been prayed for on the following grounds;

(a) The basic ingredients of the alleged offence are lacking in the allegations made in the FIR.

(b) An offence of criminal breach of trust punishable u/s 406 of the Indian Penal Code cannot be committed in respect of a property belonging to a company, but is an offence committed by a person in respect of a property which has been specially entrusted to such person under a special contract and when he holds the property in fiduciary capacity under special contract, if he misappropriates the same.

(c) Although it has been alleged that the petitioner has removed all the articles but there is no allegation that one of such article has been misappropriated.

(d) It has never been alleged that dominion over property was a result of special entrustment.

(e) No offence punishable u/s 430 of the Indian Penal Code has been made out.

(f) The FIR has been lodged by the defacto-complainant to save himself and alleged articles in question have long been removed by the defacto complainant himself.

4. Heard Mr. Joymalya Bagchi, the learned advocate appearing on behalf of the petitioner but inspite of repeated calls none appears either on behalf of the State or on behalf of the complainant the opposite party No. 2. The affidavit of service showing the service has been effected upon the said opposite parties be kept with the records.

5. The learned Counsel appearing for the petitioner besides raising the aforesaid

grounds further submitted as follows;

(a) No offence of criminal breach of trust can be committed by any person, who according to the complainant is a partner, in respect of the property belonging to such firm.

(b) Secondly, in a case of partnership every partner has the dominion over the partnership property by reason of the fact he is a partner.

This is kind of dominion which every owner of property has over his property but it is not dominion of this kind which satisfied the requirements of Section 405 and in absence of any allegations of existence of special agreement between the partners as regards to any particular property of the firm it cannot be said that such partner is holding the property in a fiduciary capacity. Since the partner has the ownership over all the assets of the firm if he utilized those properties for his personal gain he will only liable for civil consequences to his other partners. In support of his submissions Mr. Bagchi relied on two decisions, one is of the Apex Court in the case of Velji Raghavji Patel v. The State of Maharashtra reported in 1965 (2) CLJ 431 and a full bench decision of this Hon''ble High Court in the case of Bhuban Mohan Das Vs. Surendra Mohan Das,

6. Considered the submissions so made on behalf of the petitioner. Perused the First Information Report as well as the other materials on record.

7. It is an admitted position that the petitioner and the defacto-complainant are not the partners of Presto Animation Studio Private Limited. On the contrary, Presto Animation Studio Private Limited is a public limited company of which the petitioner and the defacto-complainant are Directors, while they are holding a share of 47.5% each, the balance 5% is held by the wife of the petitioner. Thus this is not a case where one of the partner has made allegation of criminal breach of trust by another partner in respect of the property belonging to the partnership firm and there cannot be any offence of criminal breach of trust for the simple reason in case of partnership every partner has dominion over the partnership property by reason of the fact he is the partner, which is a kind of dominion that every owner of property has over his property but is not a dominion of a kind which satisfies the requirements of provisions of Section 405 and when there is no allegation that the alleged misappropriated property by a special agreement between the partners was entrusted to the accused person. Therefore, the legal proposition as laid down in the aforesaid two decisions relied upon on behalf of the petitioner has no application in the facts and circumstances of the instant case.

Besides above the law as laid down in the aforesaid cases cannot be of any help to the petitioner as in the impugned FIR it has been specifically alleged that by a mutual arrangement the accused was in-charge of sale, purchase and accounts etc. in fiduciary capacity and the defacto-complainant as a technical person was in-charge of manufacturing process and there was further allegations that the accused has removed all the machineries, valuable articles belonging to the company entrusted to him in the fiduciary capacity in absence of the petitioner.

8. In the case of R.K. Dalmia Vs. Delhi Administration, it was categorically held by the Apex Court that Directors are not only agents but they in some sense and to some extent are trusties of assets which come into their hands or which are under their control and are entrusted with the dominion over the funds of the company in the bank. In the said decision it was further held that entrustment of property in the capacity of agent will by itself be sufficient to make out the offence of criminal breach of trust by the Directors who are the agent of the company.

The submissions that there is the only allegation that the assets of the company has been removed but there is no allegation of misappropriation of the same thus the instant FIR has to be quashed is without any force. It is well settled that a FIR is not encyclopedia of the prosecution case and if one or two basic ingredients of the offence is missing that would not render the FIR liable to be quashed.

Moreover, after the registration of the impugned FIR on 3rd of August, 2007, in view of pendency of this criminal revision investigation of the case has been stalled on and from middle of December, 2007 at a very early stage. Consequently no report as contemplated u/s 173 of the Code of Criminal Procedure could have been submitted. This is a case where on the face of the allegations made in the First Information Report it cannot be said that the same has not disclosed commission of any cognizable offence, thus I do not find any valid reason to interfere with the statutory power of the police to conduct investigation in a cognizable offence and to stifle a legitimate prosecution without allowing the same to reach its logical conclusion, which has been categorically discarded by the Apex Court in the case of Saroj Kumar Sahoo v. State of Orissa reported in 2006 (2) SCC 272.

9. In any event the pendency of a civil suit in respect of the self-same dispute never operates as a bar in a continuance of a criminal prosecution which is otherwise permissible in law. The question whether the property in question after its alleged removal has been misappropriated or not is a matter of investigation and same cannot be decided by this Court at this present stage.

10. For the reasons stated above, I do not find any merit in the instant criminal revisional application and same stands dismissed.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.