
(1975) 01 GUJ CK 0005
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Vora Jayantilal Chhotalal and Others

RESPONDENT

Date of Decision : 10-01-1975

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 120B, 408, 408, 409

Citation : (1975) 16 GLR 661

Hon'ble Judges : S.H. Sheth, J;M.C. Trivedi, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—Jamnadas Ramchand Soni, the complainant filed against the accused Criminal Case No. 291 of 1972 in the Court of the learned Judicial Magistrate, First Class, at Harij. He alleged that he and accused Nos. 1, 3, 4 and 5 were partners of a firm which carried on business in crude oil, petrol, diesel oil and such other things. Accused No. 2 who is the son of accused No. 1 was an employee of that firm. This business was closed on or about 24th September 1971. Therefore, accused Nos. 1, 3, 4, 5 and the complainant ceased to be the partners in that business. Books of accounts, bills, vouchers and other papers of the partnership firm were handed over to the complainant. On inspection the complainant found that the accused had misappropriated partnership funds to the extent of Rs. 21,902.10 p. Some of the misappropriations which he stated in the complaint were as follows:

On 6th November 1970 Rs. 4850/- were debited to the account of The State Bank of India showing that that amount was deposited in the State Bank. However, it was found that actually what was deposited in the State Bank was a sum of Rs. 3850/- and that, therefore, the accused had misappropriated a sum of Rs. 1000/-. Next, the counter-foil of the paying-in-slip showed that Rs. 7600/- were deposited on 24th May 1971 with Bank of Baroda but the corresponding entry in the books of account showed a sum of Rs 9000/- debited to Bank of Baroda. Therefore, according to the complainant, a sum of Rs. 1400/- was misappropriated. Similarly, it was found that on 15th June 1971 a sum of Rs.

2000/- was withdrawn from Bank of Baroda and that it was not credited in the account-books of the partnership firm. Therefore, according to the complainant, that amount was misappropriated. He therefore, charged the accused with misappropriations and falsification of accounts. The complainant further alleged that a sum of Rs. 2000/- was paid to accused No. 2 for the purpose of falsifying the books of accounts and that it was not debited in the account-books of the firm.

2. The learned Magistrate, upon receipt of the complaint, directed the police to investigate into it. The police accordingly investigated into the offences and charge-sheeted the accused. Before the learned Magistrate recorded evidence it was argued before him that a partner in law cannot be held liable for misappropriation of partnership funds nor can he be held liable for a criminal breach of trust in respect of partnership funds. By his order dated 25th October 1972 the learned Magistrate upheld that contention and discharged all the accused.

3. This order was challenged by the complainant in Criminal Revision Application No. 49 of 1972. It was also challenged by the State of Gujarat in Criminal Revision Application No. 50 of 1972. Both these revision applications were filed in the Court of Sessions at Mehsana. By his common order dated 23rd February 1973 the learned Additional Sessions Judge who heard both these revision applications dismissed them.

4. It is that order which is challenged by the State of Gujarat in this Criminal Revision Application.

5. This revision application came up for hearing before Mr. Justice Surti. He found that there was a conflict between the two decisions of the Supreme Court—one in R.K. Dalmia Vs. Delhi Administration, Supreme Court 1821 and another in Velji Raghavji Patel Vs. State of Maharashtra, . It appeared to him that in Velji's case (supra) Dalmia's case (supra) was not cited before the Supreme Court. He also found that while deciding the case of Jashbhai v. Hasmukhlal 13 G.L.R. 617 this Court had not considered the decision of the Supreme Court in Dalmia's case (supra). He, therefore, referred this Revision Application to a larger Bench and that is how we are called upon to decide in this Revision Application the following question:

Can a partner be held liable for offences punishable under Sections 408, 409, 467, 468, 477A, 420 and 120B of I.P.C. if he is alleged to have committed them in respect of partnership property or funds?

6. Before we proceed to examine this question it is necessary for us to note a few salient facts of the case. The learned Magistrate did not examine any witnesses. The case was argued before him on the basis that such a complaint filed by one partner against another was not maintainable. It is necessary to note that one of the allegations which the complainant has made in the complaint, when translated into English, reads thus:

...the charge of entire business of petrol, diesel, crude oil etc. was entrusted to accused No. 1....

If this allegation is proved by the complainant it will amount to entrustment of the entire business to accused No. 1. Several decisions have been cited before us in order to elucidate the contention which has been raised on behalf of the complainant.

7. The first decision is in *R.K. Dalmia Vs. Delhi Administration*, . The material facts of that case are as follows. Dalmia was both Chairman and Principal Officer of Bharat Insurance Co. at the material time. There was an account of the Insurance Company with the Chartered Bank of India, Australia and China Ltd. which Dalmia and Chokhani had by their application to the Bank opened at Bombay. With effect from 1-10-53 the account was allowed to be operated by the Board of Directors by Chokhani and Raghunath Rai. In fact, Chokhani obtained in advance Raghunath Rai's signatures on blank cheque forms and thus in practice operated the account alone. It led to the unauthorised use of the Insurance Company's funds. Chokhani was not empowered by the Board of Directors to sell and purchase securities but he did so under the instructions of Dalmia. Chokhani entered into a transaction of purchasing securities from Bhagwati Trading Co. which was owned by Vishnuprasad-a nephew of Chokhani and aged about 19 years. The entire business of Bhagwati Trading Company was conducted by Chokhani. Chokhani issued cheques to Bhagwati Trading Co. in payment of the purchase price of the securities but the securities were not delivered to the Insurance Co. Thus the amount of cheques was paid out of the funds of the Insurance Company without any gain to it. Chokhani communicated to the head office of the Insurance Company that securities were sold and purchased and submitted statements of accounts. He however did not intimate to the head office that securities were not delivered to the Insurance Company and that the cheques were issued to Bhagwati Trading Company without the delivery of the securities. When the accounts of the Insurance Company were audited the auditors found an unsatisfactory state of affairs. The rumour about the unsatisfactory position of securities of the Insurance Company reached the Ministry of Finance, Government of India. It was learnt by the Government that there was a shortfall of securities. The matter was pursued by the Government. It was investigated into under the Insurance Act and later on the entire case was made over to the police. Dalmia and Chokhani, amongst others, were charge-sheeted at the conclusion of the police investigation. At the trial, the learned Sessions Judge convicted them of offences punishable u/s 120B read with Section 409, I.P.C. The High Court confirmed the conviction. The matter went in appeal to the Supreme Court. One of the questions which was raised before the Supreme Court related to the construction of Section 409 I.P.C. This section deals with an offence of criminal breach of trust inter alia against a banker, merchant, factor, broker, attorney or agent. While construing Section 409 this is what the Supreme Court has observed in paragraph 96 of the report.

What Section 409 I.P.C. requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression "in the way of his business" means that the property is entrusted to him "in the ordinary course of his duty or habitual occupation or profession or trade." He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of Section 409 I.P.C. if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in *Reg. v. Portugal* (1885) 16 Q.B.D. 487 or in *Coory's Case* 1853 A.C. 407, and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression "in the way of his business" is used in place of the expression "in his capacity," to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in Sections 406 to 408 I.P.C. The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent. We need not speculate about the reasons which induced the Legislature to make the breach of trust by an agent more severely punishable than the breach of trust committed by any servant. The agent acts mostly as a representative of the principal and has more power in dealing with the property of the principal and consequently, there are greater chances of his misappropriating the property if he be so minded and less chances of his detection.

Therefore, according to the Supreme Court, Section 409 I.P.C. is attracted to a case where property has been "entrusted" to an agent "in the way of his business". Their Lordships then held that a company carries on its business by its agents or that persons by whom a company acts and carries on its business, though called directors, are really its agents (vide paragraphs 97 to 99 of the report). In this case, the Supreme Court was not called upon to decide whether a partner can be held liable for an offence of criminal breach of trust. However, the Supreme Court has referred with approval to two decisions. The first decision is in *Queen v. Okhoy Coomar Shaw* decided by a Full Bench of the Calcutta High Court in 21 Suth WCR 59 (13 Beng LR 307) in which it was held that "the words of Section 405 of the Penal Code are large enough to include the case of a partner, be proved that he was in fact entrusted with the partnership property, or with dominion over it, and has dishonestly misappropriated it, or converted it to his own use" The next decision is in *Jagannath Raghunathdas v. Emperor* 33

BomLR 1518 : AIR 1932 Bom57 from which the following passage has been quoted by the Supreme Court with approval.

But, in my opinion, the words of the section (Section 405) are quite wide enough to cover the case of a partner. Where one partner is given authority by the other partners to collect monies or property of the firm, I think he is entrusted with the dominion over that property, and if he dishonestly misappropriates it then I think he comes within the section.

It is, therefore, clear that a partner can be held liable for an offence of criminal breach of trust if entrustment of partnership property to him is proved or if it is shown that he was given authority to collect monies or property of the firm.

8. In *Velji Raghavji Patel Vs. State of Maharashtra*, the material facts of the case were as follows: Velji Raghavji Patel, a partner of M/s Bharat Silp Pramandal, was alleged to have misappropriated different sums amounting to Rs. 8905/- out of the funds of the firm. The Trial Court convicted him of an offence u/s 409 I.P.C. on some counts. The High Court on appeal confirmed the conviction. The matter was taken to the Supreme Court where the question which arose was whether a partner can be convicted of an offence of criminal breach of trust. The Supreme Court, while answering the question held as follows:

Upon the plain reading of Section 405, I.P.C. 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.

This was a case in which a partner was charged with having committed an offence of criminal breach of trust. It was in that context that the Supreme Court held that there could not be an entrustment to a partner merely by virtue of his dominion over property as a partner unless there was a special agreement between the parties showing entrustment to the accused. In that case it was in the alternative contended that the act of the accused would atleast amount to dishonest misappropriation of property even though it might not amount to

criminal breach of trust. It was, therefore, argued that his conviction should be altered from one u/s 409 to one u/s 403. After having quoted Section 403 of the Indian Penal Code this is what the Supreme Court has held:

It is obvious that an owner of property, in whichever way he uses his property and with whatever intention will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. As already stated, a partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation.

It is clear from this decision that since a partner has undefined ownership along with other partners over all the assets of the partnership, he cannot be held liable for an offence punishable u/s 403 because an owner of a property in whichever way he uses the property and with whatever intention will not be liable for misappropriation. This principle, according to the Supreme Court holds good even if the accused is not the exclusive owner of the property.

9. In our opinion, there is no conflict between the decisions of the Supreme Court in *Dalmia* 's case (supra) and in *Velji* 's case (supra). In relation to the criminal liability of a partner for a breach of trust, whereas the principle approved in *Dalmia*'s case (supra) requires entrustment to a partner to be proved or conferment of authority to a partner to collect monies or property of the firm to be proved, in *Velji*'s case (supra) the same principle has been stated in a different form by observing that a special agreement entrusting the monies or property of the firm to a partner should be proved. A partner, in his capacity as a partner, has along with others general dominion over the property and monies of the firm. Yet, for the purposes of criminal breach of trust, entrustment must be proved. Such entrustment can only be by a special agreement. Or for that purpose conferment of authority to a partner to collect monies or property of the firm must be proved. Such conferment can only be by special agreement. It is this kind of special agreement which has been referred to in *Velji*'s case (supra). There is, therefore, no conflict between the two decisions. Both of them lay down the same principle which has been expressed in different language. The principle approved or laid down is that a partner can be held liable for an offence of criminal breach of trust, not because he is a partner and therefore has dominion over partnership property or monies, but only if entrustment in any form is proved. Such an entrustment may be by overtly handing over to him or placing him in charge of partnership property or monies or by giving him a special opportunity to collect them. Such a special agreement may be in the form of a resolution passed by the partners or in the form of a decision taken by them or in the form of a special covenant incorporated into the partnership deed or it may be inferred from the conduct of the partners which unfailingly leads to that conclusion.

10. *Prem Ballabh Khulbe Vs. Mathura Datt Bhatt*, was a civil case. Therefore, the

question of entrustment of partnership property or monies to a partner, in the context of criminal breach of trust, did not arise. However, in the context of the principle that a partner who received monies on account of the partnership firm, that is to say, on account of himself and his copartners did not do so in any fiduciary capacity towards other partners, Velji's case (supra) has been referred to.

11. In *The State of Gujarat Vs. Jaswantlal Nathalal*, the question as to the criminal liability of a partner for breach of trust did not arise. However, the expression "entrusted" has been explained by the Supreme Court in its different implications. In that context the earlier decision of the Supreme Court in Velji's case (supra) has been referred to with approval. While explaining different implications of the expression "entrusted" it has been observed that it governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter. Next, it has been observed that before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. However, it has been next observed that it does not mean that such an entrustment need conform to all the technicalities of the law of trust. Proceeding further the Supreme Court has observed that the expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner and the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them.

12. *Debabrata Gupta Vs. S.K. Ghosh*, Supreme Court Cases 521 was a case in which a partner was alleged to have committed criminal breach of trust. The decision of the Supreme Court in Velji's case (supra) has been referred to with approval in this case. In that context the Supreme Court has observed that in order to exonerate a partner from the liability of criminal breach of trust it must first be established that the dispute is only between the partners and that it does not relate to any special entrustment of property which constitutes one of the basic ingredients of an offence u/s 406 I.P.C. The offence of criminal breach of trust u/s 406 I.P.C. is not in respect of property belonging to the partnership but is an offence committed by the person in respect of property which has been specially entrusted to such a person and which he holds in a fiduciary capacity. Where the accused denies that there was any special entrustment of any property to him or that he was holding any property in a fiduciary capacity, it is not desirable to express any opinion on the merits of such a plea unless the facts are in possession of the Court which means that an investigation must be made and an inquiry should be held.

13. *Som Nath Puri Vs. The State of Rajasthan*, was a case in which a traffic assistant in the office of the Indian Airlines Corporation had committed criminal

breach of trust and fraudulently misappropriated monies received in the name of the Corporation. In that context the Supreme Court has in that decision explained the connotation of the expression "entrusted" used in Section 409, I.P.C. This is what the Supreme Court has stated in that behalf:

The section does not provide that the entrustment of the property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression "entrusted" in Section 409 is used in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the trusts on which possession has been handed over. It may be that a person to whom the property is handed over may be an agent of the person to whom it is entrusted or to whom it may belong, in which case if the agent who comes into possession of it on behalf of his principal, fraudulently misappropriates the property, he is nonetheless guilty of criminal breach of trust because as an agent he is entrusted with it. A person authorised to collect moneys on behalf of another is entrusted with the money when the amounts are paid to him, and though the person paying may no longer have any proprietary interest nonetheless the person on whose behalf it was collected becomes the owner as soon as the amount is handed over to the person so authorised to collect on his behalf.

14. This decision lends support to the view expressed by the High Court of Bombay in Jagannath's case (supra) referred to with approval by the Supreme Court in Dalmia's case (supra). Authority given to a partner to collect property or monies of the partnership firm can amount to entrustment of the property or monies to him. In Jagannath Raghunathdas v. Emperor AIR 1932 Bom 57 which the Supreme Court has referred to with approval in Dalmia's case (supra) the facts were as follows. The accused was a partner of the firm of Rai Sahib Ramdayal Ghasiram. He brought from the constituents of the firm various amounts of monies aggregating to Rs. 51,228-5-0 and dishonestly misappropriated them. It was contended that Section 405 did not apply to the case, of a partner dealing with partnership property. Answering the contention the High Court of Bombay held that "the words of the section are quite wide enough to cover the case of a partner. 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 the section." Having thus observed the High Court of Bombay referred with approval to the decision of a Full Bench of the Calcutta High Court in Okhoy Coomar Shaw's case (supra).

15. In Ambalal Patel v. Jethabai Fatal and Anr. ILR (1968) 1 Ker 96 the facts of the case were as follows. The accused, the complainant and some others were

partners of a firm. The accused, in the name of paying income tax for the firm, misappropriated a sum of about Rs. 5000/- and made a false entry in the books of account of the firm. The accused was therefore charged with the commission of the offence of misappropriation. He was discharged by the Courts below. When the matter went to the High Court of Kerala, the question which was agitated was whether a partner can be held liable for an offence punishable u/s 403 F.P.C. The question whether he could be liable for an offence u/s 406 I.P.C. was in terms not raised before the Kerala High Court. After having examined a few decisions this is what Mr. Justice Mathew has laid down:

But, in a case where he has taken money from the partnership and utilised it for his own purposes, but entered in the accounts of the firm that the money has been drawn and utilised for the purpose of the partnership, I think, he is liable for criminal misappropriation of the partnership property.

It appears that in taking this view, the learned Judge was influenced by Section 1 of Larceny and Embezzlement Act, 1868 of England because after having quoted the material part of that section in his judgment, this is what he has observed:

Although we have no corresponding Act, I think, the terms of the section are wide enough to include a partner dishonestly appropriating the partnership property.

In our opinion, the dictum laid down by Mr. Justice Mathew is in direct conflict with the following dictum laid down by the Supreme Court in *Velji* 's case (supra) in which the alternative argument which was raised was that a partner could be held liable for having committed misappropriation punishable u/s 403 I.P.C.

It is obvious that an owner of property, in whichever way he uses his property and with whatever intention will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. As already stated, a partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation.

With respect, therefore, we think that the dictum laid down by Mr. Justice Mathew in *Ambalal Patel* 's case (supra) is not a good law.

16. In *Bhuban Mohan Das Vs. Surendra Mohan Das*, a Full Bench of five Judges of the Calcutta High Court considered amongst others its earlier Full Bench decision in *Okhoy Coomar*'s case (supra). The facts in *Bhuban Mohan*'s case were as follows. The complainant and the accused were partners in business. On account of communal disturbances, the accused proposed that the stock in trade should be removed to his house which was outside the danger zone. The complainant agreed. The stock in trade was thus removed to the house of the accused. It was to be returned after the communal disturbances passed off. Upon the restoration of normalcy, the complainant asked the accused to return the

stock in trade. The accused denied knowledge thereof altogether. The complainant sought to prosecute the accused for an offence punishable u/s 406 I.P.C. The Magistrate overruled the objection raised on behalf of the accused that no proceedings could be against him u/s 406 I.P.C. because the parties were admittedly partners and framed the charge. An application was made to the Calcutta High Court to quash the charge. It was heard by a Bench which referred the following question to the Full Bench as they found that there was conflict of authorities on the point.

Can a charge u/s 406, Penal Code be framed against a person who, according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners?

The second question which was referred to the Full Bench was whether *Queen v. Okhoy Coomar* 13 Beng. L.R. 307 was correctly decided. We would like to note here that the decision of the Calcutta High Court in *Okhoy Coomar*'s case has been referred to with approval by the Supreme Court in *Dalmia*'s case (supra). It is interesting to note that in *Dalmia*'s case (supra), though the decision of the Calcutta High Court in *Okhoy Coomar*'s case (supra) was brought to the notice of the Supreme Court, the subsequent decision of that High Court in *Bhuban Mohan Das*'s case (supra) in which the decision in *Okhoy Coomar*'s case (supra) appears to have been overruled was not brought to the notice of the Supreme Court and in *Velji*'s case (supra) their earlier decision in *Dalmia*'s case (supra) was not brought to the notice of the Supreme Court though in *Velji*'s case (supra) both the aforesaid decisions of Calcutta High Court were brought to the notice of the Supreme Court. In *Bhuban Mohan Das*'s case (supra) the Calcutta High Court has firstly held that a partner who receives payment on behalf of the firm (and he can do so in law) receives it on behalf of himself and his other partners. Therefore, he does not receive or hold it in any fiduciary capacity, that is to say, as a kind of trustee for himself and his other partners. Therefore, according to the Calcutta High Court, there is no entrustment to him and a partner cannot be held liable for criminal breach of trust. Thereafter, the Calcutta High Court examined the position under law in light of Larceny and Embezzlement Act of England and recorded the conclusion that our law is different from English law, it is interesting to note that whereas in *Ambalal Palel*'s case (supra), Mr. Justice Mathew of the Kerala High Court found that the language of Section 403 I.P.C. was wide enough to cover cases which would fall under Larceny and Embezzlement Act of England, the Calcutta High Court in *Bhuban Mohan Das*'s case (supra) thought that the position under English Law was different from one under our law.

17. On the question raised before the Calcutta High Court the Full Bench held that if a partner is to be charged u/s 406 I.P.C. it must be held that property belonging to some one else was entrusted to him. A partnership firm, unlike a limited company, has no existence apart from the partners and is not an entity which can own property. If a partner holds partnership property it cannot be said

that he has been entrusted with somebody else's property nor can it be said that he has been entrusted with his share and with his partner's share because none has a definite share unless accounts have been taken, debts have been discharged and assets have been divided according to the partnership agreement. Therefore, according to the Calcutta High Court, a partner cannot be charged with an offence of criminal breach of trust.

18. Referring to the decision in Okhoy Coomar's case (supra) the Calcutta High Court has observed that it was not clear in what circumstances the Full Bench in Okhoy Coomar's case (supra) was of the opinion that an offence u/s 405 I.P.C. could be established. In their view, if it could be made out that one partner had been entrusted with property or with dominion over it no difficulty would arise. Where entrustment to a partner is proved, different considerations arise. They have been stated by the Calcutta High Court in the following terms:

A person who receives property in a fiduciary capacity must deal with the property according to the terms of the arrangement or trust. He cannot dispose of the property as he likes and claim to account for it at some later stage.

After having examined a number of decisions, the Calcutta High Court has summed up their conclusion in the following terms.

Whether or not a partner can be said to have been entrusted with property must depend upon whether there is any special agreement between the parties. If there is no special agreement he does not receive property in a fiduciary capacity. It might be that if there was a special arrangement between the partners then it could be said that a partner was entrusted with property or with dominion over it. For example, if by the terms of the partnership agreement one partner was given the sole right to possession of the partnership assets or to receive moneys on behalf of the partnership then such a partner might, though it is unnecessary to hold it, be said to have entrusted another partner with money if he gave such other partner money for a specific purpose. It is unnecessary in this case to decide in what circumstances there can be entrustment. But all we need say is that by special agreement between the parties entrustment might be possible, and if entrustment was possible then a breach of conditions or arrangement might render the person accused guilty of fraudulent breach of trust. However I am satisfied that in ordinary cases where a partner receives moneys or an asset belonging to a partnership, or holds moneys or assets of a partnership, he does not hold that money in a fiduciary capacity. He cannot even be sued for a share in the moneys or assets by his co-partner.

This view taken by the Calcutta High Court in this case has been approved by the Supreme Court in Velji's case (supra). However, since the Calcutta High Court in Bhuban Mohan Das's case (supra) could not find in its earlier decision in Okhoy Coomar's case (supra) under what circumstances an offence of criminal breach of trust could be established against a partner, it overruled its earlier decision in Okhoy Coomar's case only in qualified terms. They observed in that context as

follows:

...these cases cannot be regarded as correctly decided if they lay down any general rules applicable to prosecutions of partners for offences u/s 406, Penal Code, in respect of property received or held by such partners on behalf of the partnership in the ordinary course of partnership dealings. However the cases may be regarded as rightly decided, if they are confined to cases where under special agreements made between the parties entrustment of the property or dominion over it could be given to any particular partner.

Though the decision in Okhoy Coomar's case (supra) has been overruled in qualified terms, the overruling loses its value because the Supreme Court, in our opinion, has in Dalmia 's case (supra) referred to it with approval on the footing that the principle laid down in Okhoy Coomar's case is applicable to a case where a partner has been entrusted with the partnership property or dominion over it.

19. The Madras High Court in K.V. Subbiah Vs. T. Chalapathi Rao, has followed the decision of the Supreme Court in Velji's case (supra). It was a case of a partner who was charged with an offence punishable u/s 406 I.P.C. It may be noted that the earlier decision of the Supreme Court in Dalmia's case (supra) was not cited before the Madras High Court in this case.

20. The last decision on the point is in Jashbhai Gordhanbhai Patel and Anr. v. Hasmukhlal Kalidas Patel and Anr. 13 GLR 617. It has been observed by the learned single Judge that unless, by a special agreement between the partners, the work of receiving cash belonging to the partnership was exclusively given to another partner, it could not be said that a partner, who received amounts of the firm in the ordinary course as a partner, received it in a fiduciary capacity, because, in the eyes of law, he is also the owner of that amount. In his opinion, an owner of property, in whichever way he uses his property and with whatever intention will not be liable for misappropriation and it would be so even if he is not the exclusive owner thereof. He has next observed that a partner has undefined ownership along with the other partners over all the assets of the partnership and therefore if he chooses to use any of them for this own purpose he may be accountable civilly to the other partners. However, according to him, he does not thereby commit any misappropriation so as to be punished u/s 406 I.P.C. This view expressed by the learned single Judge has been founded on the view expressed by the Supreme Court in Velji's case (supra). However, it appears to us that the learned single Judge has not correctly read the decision of the High Court of Bombay in Jagannathe's case (supra) in the context of several decisions of the Supreme Court and has, therefore, with respect, erroneously held that the decision of the Bombay High Court in Jagannath 's case (supra) is no longer good law.

21. We now turn to the charge u/s 477A. The position in regard to such a charge against a partner is quite simple and well-settled. As early as in 1904 the High

Court of Bombay in *Emperor v. Laloo Ghella* 6 Bombay Law Reporter 553 held that where a partner in a firm is appointed as such to manage the business of the firm or to write its accounts, he acts as its servant. Therefore, according to the High Court of Bombay, if he falsifies accounts, he is liable to be punished u/s 477A of Indian Penal Code. It has also been held in that decision that a partner who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted or which he has dominion over, is guilty of an offence u/s 405 I.P.C. The latter view of the High Court of Bombay is not now relevant for the purpose of this case in view of the several decisions of the Supreme Court to which we have referred in course of this judgment. However, the first mentioned view of the High Court of Bombay supports the contention raised by the complainant before us that a partner can be held liable for an offence u/s 477A, I.P.C. In *Jashbhai's* case (supra) the learned single Judge has expressed a contrary view. He has held that if a partner gets false entries made in the books of account of the partnership firm, he cannot be said to be acting in the capacity of a cleric, officer or servant of the firm. According to him, the relationship which is contemplated by Section 477A is the relationship of master and servant, while the relationship between the partners *inter se* is the relationship of principal and agent. According to him, therefore, unless there is a special agreement to show that a particular partner was appointed to act in the capacity of a clerk, officer or servant, it could not be said that such a partner had committed an offence u/s 477A, I.P.C. by getting false entries made in the books of accounts because there was no employer of such a partner and the books belonged to such a partner along with other partners. This view is contrary to the view expressed by Division Bench of the High Court of Bombay in *Laloo Ghella's* case (supra). It appears from the body of the judgment that even though the learned single Judge did not agree to the principle laid down by the Division Bench of the High Court of Bombay in *Laloo Ghella's* case, he observed that even if the principle enunciated in *Laloo Ghella's* case (supra) was applied to the facts of the case before him, the accused would not be liable.

22. The decision of the High Court of Bombay in *Laloo Ghella's* case (supra) was followed by that High Court in *State of Bombay Vs. Devakinandan Kanhyalal Agarwal*, . The view taken by the learned single Judge in *Jashbhai's* case (supra) also runs contrary to the view expressed by the High Court of Bombay in *Devkinandan's* case (supra).

23. In Criminal Appeals Nos. 384 of 1970 and 385 of 1970 decided by Mr. Justice M.P. Thakkar and Mr. Justice C.V. Rane on 6th/8th November 1971 a similar question arose. While construing Section 477A it has been observed in that decision that by using the expression "employed or acting in the capacity of a clerk, officer or servant" in Section 477A the legislature wanted to embrace within its sweep not only persons who are actually holding the post of a clerk, officer or servant but also persons who though they did not hold any such relationship with the person to whom the books of accounts belonged, were "employed or acting in the capacity of a clerk, officer or servant." In the context

of a partner the learned Judges observed that there is no legal impediment in the way of a partner acting for the purpose of writing accounts as a clerk, servant or officer of the partnership firm. They have further observed that the expression "employed" does not necessarily connote relationship of master and servant and, therefore, a person who is a partner would fall within the description of "employed or acting in the capacity of a clerk, officer or servant" u/s 477A. Whether a partner who has undertaken such work for the partnership firm receives remuneration or not would not, in the opinion of the learned Judges, make any difference. While placing the gloss over the expression "employed which they have done they have taken into account the dictionary meaning of that expression" One of the meanings assigned to it is "to commission or to entrust with the management of one's affairs". While taking this view they have been principally influenced by the consideration that "to hold otherwise to recognize the charter of partners to falsify the account books belonging to the partnership with impunity and to hold that the legislature did not intend to provide any remedy against such misdeeds. Though a person who makes a false entry in his own books of accounts cannot be said to have committed an offence because one cannot defraud oneself, yet a partner who does so in relation to the books of accounts of the partnership can certainly defraud other partners. We are in complete agreement with the reasons stated in this unreported judgment of this Court and with the view taken by the High Court of Bombay in *halloo Ghella*'s case (supra) and *Devkinandan*'s case (supra). We are, therefore of the opinion that the view expressed by the learned single Judge in *Jashbhai*'s case (supra) is not a correct view and the authority the decision in *halloo Ghella*'s case (supra) is not shaken or destroyed by the decision of the Supreme Court in *Velji*'s case (supra). Therefore, in our view, a partner who has dishonestly falsified the books of Accounts of the firm and tried to defraud his partners can be charged with the commission of an offence u/s 477A, I.P.C.

24. Concluding the review of the case law referred to above, we think that the view which prevails is that a partner can be held liable for an offence of criminal breach of trust if there is a special agreement by which he has been entrusted with the property or monies of the partnership firm or with dominion over it. The complainant has pleaded such an agreement in the complaint. If it is proved, Section 408 or 409, as the case may be, would be attracted to this case. We also think that where a partner has dishonestly falsified the books of accounts of the partnership firm, Section 477A, I.P.C. is attracted.

In that view of the matter, the learned Magistrate could not have dismissed the complaint without recording the evidence and could not have discharged the accused.

25. We, therefore, allow this Revision Application, set aside the orders made by the Courts below and send back the case to the learned Magistrate for recording the evidence and deciding it on merits, according to law and in light of the observations made in this judgment. Rule is made absolute.