(1993) 10 DEL CK 0040

In the Delhi High Court

Case No : Criminal Miscellaneous (Main) Appeal No. 371 of 1991

Sushil Kanta Chakravarty APPELLANT

Vs

State and Others RESPONDENT

Date of Decision : 01-10-1993

Acts Referred:

Citation : (1993) 52 DLT 91

Hon'ble Judges : Sagar Chand Jain, J

Bench : Single Bench

Advocate : D.R. Sethi, Atul Batra and Suman Kapoor, for the Appellant;

Judgement

S.C. Jain, J.

(1) The facts giving rise to this petition are that Shri Samarjit Chakravarty (hereinafter referred to as respondent No. 2) filed a criminal complaint under Sections 406, 409, 420 read with Section 120-B IPC against Shri Sushil Kanta Chakravarty (the petitioner herein) and Shri J.K. Sood, Senior Manager, Indian Overseas Bank, Janpath Branch,New Delhi on the allegations that the complainant, Shri Samarjit Chakravarty, Smt. Arati Chakravarty, wife of Shri Sunil Kanta Chakravarty and Shri Sushil Kanta Chakravarty are partners of M/s-ESPI (New Delhi)Trading Company, having its registered office at Ii, Tolstoy Marg, New Delhi. The said firm was maintaining an account with Indian OverseasBank, Janpath, New Delhi, being current account No. 503, which was being operated either by the complainant, Shri Samarjit Chakravarty or by Shri Sushil Kanta Chakravarty, the petitioner herein. It is further alleged that a portion of the premises of the said firm was on rent with CanaraBank. In the year 1987 the petitioner herein had collected the rent by cheque from the said tenant i.e. from the Canara Bank and he clandestinely opened a bank account in the name of the firm showing himself to be the proprietor of M/s ESPf (New Delhi) Trading Company. The said proprietary account in the name of the company was opened in the Canara Bank, OverseasBranch, Competent House, Nem Delhi with the sole purpose of diverting the cheques received on behalf of the company, so that the

other partners may not know about the payment received by the petitioner herein. In August,1987, Shri Samarjit Chakravarty the complainant came to know about it anda notice to the Canara Bank was served upon the Canara Bank Merchant Banking Bureau, New Delhi with a request to the said bank to direct closure of the proprietorship account at Overseas Branch, Competent House, New Delhi and transfer of the balance of the said account to the account of the firm at Indian Overseas Branch, Janpath, New Delhi and the same was done.Shri Samarjit Chakravarty, the complainant wrote the letter dated 24-8-1987to the Manager, Indian Overseas Bank, Janpath Branch, New Delhi that infuture all cheques and transfers etc. pertaining to the account of the partner-ship firm were to be honoured only on the joint signatures of Shri Samarjit Chakravarty, the complainant and Shri Sushil Kanta Chakravarty, the petitioner herein. It is further alleged in the complaint that the said letter was duly served on the bank and thereafter all the cheques of the firm were signed by both the partners i.e. Shri Samarjit Chakravarty, the complainant and Shri Sushil Kanta Chakravarty, the petitioner herein till the end ofJanuary, 1989.

(2) In May, 1988 the partners of the said firm decided to sell the business premises pertaining to the partnership firm for Rs. 24 lakhs and a written agreement was signed on 22-9-1988 and the sale proceeds were to be disbursed in the manner as mentioned in that agreement. The entire sale proceeds were realised and deposited in the firm''s account with Indian Overseas Bank, Janpath Branch, New Delhi being Current Account No. 503,on the assurance and understanding that the withdrawals from the said account for use for specified purpose as mentioned in this agreement would be done jointly by the complainant, Shri Samarjit Chakravarty and the petitioner herein, Shri Sushil Kanta Chakravarty. The bank had already been informed by letters dated 24-8-1987 and 20-9-1988 that the withdrawal or transfer from the said account cannot be effected without the joint signatures of Shri Samarjit Chakravarty, the complainant and Shri Sushil Kanta Chakravarty, the petitioner herein. It has been further alleged that in the second week of March, 1989 Shri Samarjit Chakravarty, (the complainant)same to know that Shri Sushil Kanta Chakravarty, (the petitioner herein)had clandestinely and fraudulently with active connivance of and in cons-piracy with Shri J.K. Sood, Senior Manager of Indian Overseas Bank,Janpath, New Delhi has illegally and unauthorizedly withdrawn/transferred a sum of Rs. 13,23,000 from the said account No. 503 belonging to the company by withdrawing a cash sum of Rs. 7,05,000 vide cheque No. 849425 and by getting a sum of Rs. 6,00,000 transferred from the aforesaid company''saccount vide cheque No. 849422 to his personal account in the sama Bank on30-1-89. Again on 10-2-89, Shri Sushil Kanta Chakravarty, the petitioner here-in, got a cheque for a sum of Rs 18,000 encased vide cheque No. 582926.The aforesaid sum of Rs. 13,23,000 i.e. Rs. 7,05,000, Rs. 18,000 as cash andRs. 6,00,000 by way of transfer was respectively withdrawn and transferred by Shri Sushil Kanta Chakravarty, the petitioner herein by singly signing the cheques/letters of request for transfer of the aforesaid sum. As per the allegations made in the

complaint filed, Sbri Sushil Kanta Chakravarty, the petitioner herein criminally and fraudulently misappropriated a sum ofRs. 13,23,000 belonging to the company causing wrongful loss to the com-plainant, the third partner, and the company itself and has caused wrongful gain to himself by cheating and criminally misappropriating this sum ofRs. 13,23,000. It is further alleged that Shri J.K. Sood, respondent No. 3herein, in the capacity of the Senior Manager of the bank has actively connived and conspired with the petitioner herein in clandestinely allowing and permitting the aforesaid cheques and transfer of funds without the signatures of the second signatory, i.e. Sbri Samarjit Chakravarty, the complainant.Shri Sushil Kanta Chakravarty, the petitioner berein, being the partner of the company was jointly entrusted with the money belonging to the company in the said account of Indian Overseas Bank, Janpath, New Delhi and he was not authorised to withdraw and transfer the money of the company for his own use and in his own account. Shri Sushil Kanta Chakravarty, the petitioner herein, in active connivance and conspiracy with Shri J.K. Sood,Senior Manager of the said bank has converted a sum of Rs. 13,23,000belonging to the company, of which the complainant is also a partner, to his own use and or disposed of the said money in violation of the directions of law prescribing the mode in which the said trust was to be discharged andt hus they have committed the offence of criminal breach of trust as defined u/s 405 Indian Penal Code and punishable under Sections 406 and 409 IPC. Shri J.K.Sood, Senior Manager of the said bank has also made himself liable u/s 120-B Indian Penal Code by colluding with Shri Sushil Kanta Chakravarty, the petitioner herein, in getting this illegal thing done.

(3) The learned Magistrate after perusing the pre-summoning evidence and the documents on record and hearing arguments came to the conclusion that there is sufficient material on record to proceed u/s 403 IPC against Sbri Sushil Kanta Chakravarty, the petitioner herein and u/s 120-B Indian Penal Code against Shri J.K. Sood. respondent No. 3 herein and they were accordingly summoned to face trial for the said offences.

(4) Aggrieved by this order of the learned Magistrate, Shri Sushil Kanta Chakravarty has filed this. petition u/s 482 Criminal Procedure Code for quashing the complaint and the proceedings.

(5) Shri D.R. Sethi, learned Counsel for the petitioner has argued that respondent No. 2 has concealed the agreement dated 28-10-1986 in his complaint, by virtue of which the said partnership was dissolved and the firm was taken over by the petitioner as a sole proprietorship concern and the petitioner is the owner of the assets of the firm. The petitioner is thus fully entitled to operate the said account. In the alternative, the learned Counselargued, even if it be presumed that the firm continued as a partnership, the Metropolitan Magistrate erred in holding that a partner can be guilty of misappropriation simplicifor, if he dishonestly converts the property to his own use because a partner has his undefined ownership along with the other partners on all the assets of the partnership. A partner, Therefore, cannot be said to commit any misappropriation

of the partnership funds. He has relied upon a decision of the Supreme Court in the case entitled Velji Raghavji Patel Vs. State of Maharashtra,) in support of his contention that in the case of partnership, every partner has dominion over the partnership property by reason of the fact that. he is a partner.This is a kind of dominion which every owner of the property has over hisproperty. But it is not dominion of this kind which satisfied the requirements of Section 405 IPC. According to the learned Counsel, a partner cannot be said to commit criminal misappropriation of partnership property, if he chooses to use any of them for his own use. He may be civilly liable to the other partners. Reliance has also been placed by the learned Counsel on a decision of the Calcutta High Court in M. Rahaman v. R.D. Khambatta, AIR(36) 1949 Cal 89. According to the learned Counsel, the Civil Court is already seized of the matter with respect to the same matter being SuitNo.1479-Aofl989titledS''a/7lar/Yf Chakravarty and Ors. v. Sushil Kanta Chakravarty pending in this Court. This criminal complaint has been filed with malicious and ulterior motive to harass and pressurise the petitioner as assets of the firm are admittedly more than the liability of the firm.

(6) According to the learned Counsel from the allegations made in the complaint no cash either u/s 403 Indian Penal Code or Section 120-B Indian Penal Code is made out and the proceedings are liable to be quashed u/s 482Cr. P.C. though these are in the initial stages. Reliance has been placed ona decision of the Supreme Court in Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandrojirao Angre and Others, insupport of his contention.

(7) Learned Counsel for respondent No. 2 has countered the arguments of the learned Counsel for the petitioner and drew my attention towards a copy of the agreement Ex Public Witness 1/11, which was alleged to have been signed on 22-9-1988 by all the three partners. According to the learned Counsel this is a special agreement duly entered between all the partners on22-9-1988 by virtue of which specific amount has been mentioned to be received by each partner besides expenditure towards payment of the tax and dues of the firm to the firm M/s Gee Vee Constructions Ltd. The learned Counsel also pointed out that the entire sale proceeds of the premises amounting to Rs. 24 lakhs was deposited in the bank account No. 503 in Indian Overseas Bank, Janpath Branch, New Delhi being the account of the firm on the condition that drawings from the bank A/e No. 503 will continue under joint signatures of Shri Sushil Kanta Chakravarty and Shri Samarjit Chakravarty, as notified to IOB Janpath Branch by Shri Samarjit Chakravarty on 24th August, 1987 and 20/09/1988.

(8) Learned Counsel has submitted that it has come in the presummoning evidence that out of his amount so deposited and specifically assigned to different partners and payment of other liabilities, Shri Sushil Kanta Chakravarty, the petitioner withdrew Rs. 13,05,000 from this account by signing singly on the cheques and out of this Rs. 7,05,000 was withdrawn in cash against one cheque only signed by him and Rs, 6,00,000 by way of transfer by this petitioner herein to his personal account in the same bank.A sum of Rs. 18,000 was withdrawn by

Shri Sushil Kanta Chakravarty, the petitioner. Thus in all Rs. 13,23,000 was withdrawn by him under his own signatures against the special agreement arrived at between the parties. The learned Counsel further submitted that these withdrawals were made from the bank with the help and connivance of Shri J.K. Sood, Senior Manager,Indian Overseas Bank, Janpath Branch; New Delhi, respondent No. 3 herein,though there were specific instructions to the bank that his account would be operated jointly on the signatures of Shri Sushil Kanta Chakravarty and Shri Samarjit Chakravarty. According to the learned Counsel, as far as this amount which was deposited in the account of the partnership firm by selling the premises belonging to the partnership by way of special agreement between the parties is concerned, the petitioner herein did not have any right to use that fund belonging to the partnership in whatever manner he chose.From the averments in the complaint as well as the presummoning evidence it is very much clear that Shri Sushil Kanta Chakravarty, the petitioner herein dishonestly converted to his own use the sum of Rs. 13,23,000 which was specially agreed to be deposited in the partnership account and was not to be withdrawn except with the joint signatures of Shri Sushil Kanta Chakravarty and Shri Samarjit Chakravarty. He further stated that the offence u/s 120B IPC is also made out against Shri J.K. Sood,Senior Manager, Indian Overseas Bank, Janpath Branch, New Delhi, who colluded and connived with Shri Sushil Kanta Chakravarty in allowing him to withdraw this much amount from the account No. 503 which was to be operated only under the joint signatures of Shri Sushil Kanta Chakravarty and Shri Samarjit Chakravarty, as intimated to the bank by notice Ex.PW 1/C. According to the learned Counsel as far as the legal proposition is concerned, there is no dispute that in the case of partnership, every partner has dominion over the partnership property by reason of the fact that he is a partner, but in the case where by way of a special agreement the amount is earmarked to be distributed among the partners and to meet other liabilities, in that case one partner cannot make use of this amount for his own use dishonestly. By way of this special agreement Ex. PW-1/H,this amount of Rs. 24,00,000 has been specifically earmarked to be distributed among the partners and to meet the liabilities and Shri Sushil Kanta Chakravarty, the petitioner herein had no right to withdraw any of the amount from this account for using the same for his own purpose and,therefore, the provisions of Sections 403 and 120B Indian Penal Code are very much attracted in this case. Reliance has been placed by him upon a decision of the Supreme Court in the case of Debabrata Gupta Vs. S.K. Ghosh, , in support of his contention that the offence of criminal breach of trust u/s 406 of the Indian Penal Code 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.

(9) According to the learned Counsel, the decisions relied upon by the learned Counsel for the petitioner are not helpful to him in the present circumstances of the cases because it is a case of entrustment by a special agreement. Regarding the argument of the learned Counsel for the petitioner that the partnership was

dissolved by an agreement dated 28.10.1986 and that this petitioner had become the sole proprietor thereafter and that this fact has been concealed in the complaint filed by respondent No. 2, the learned Counsel submitted that the agreement dated 28.10.1986 was a conditional agreement and the conditions were not fulfillled and, Therefore, it was not acted upon and the partnership continued even thereafter and this fact is corroborated by the fact that in the year 1988, 31 cheques, beingEx. P-1 to P-31, were jointly signed by the two partners i.e. Shri Sushil Kanta Chakravarty and Shri Samarjit Chakravarty. It is submitted by him that had there been a dissolution of the partnership the joint signatures of these partners could not have been there on these cheques. According to the learned Counsel, this petitioner is taking different stands suiting himi.e. (1) the partnership was dissolved in 1986 ; and (2) the funds in question belonged to the partnership and being a partner he is not guilty of criminalmisappropriation. He cannot blow hot and cold in the same breath. From the very beginning his intention was dishonest and in connivance with ShriJ.K. Sood, Sr. Manager, Indian Overseas Bank, Janpath Branch, New Delhi he had misappropriated the amount of Rs. 13,23,000 from the fund especially kept in the bank account for payments specifically mentioned in the special agreement Ex. Public Witness I/H.

(10) As far as the legal proposition is concerned, it is well settled, as has been laid down by the Hon''ble Supreme Court in Madhavrao Jiwajt Rao Scindia and Another v. Sambhajirao Chandrojirao Angre and Others etc.(supra) when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverter allegations as made prima fadie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak, and Therefore, no useful purpose is likely to be served by allowing a criminal prosecution to conti-nue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.A case of breach of trust is both a civil wrong and a criminal of offence.There would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence.

(11) It is also settled principle of law that in the case of partnership every partner has dominion over the partnership property by reason of the fact that he is a partner. But if it is established that dominion over the assets of a particular asset of the partnership was by a special agreement between the parties entrusted to the accused person, then he can be held guilty of dishonest misappropriation or conversion of partnership property, if he dishonestly converts the same to his own use. In the case of Debabrata Gupta v. S. K. Ghosh (supra) the Hou''ble Judges of the Supreme Court after taking into consideration the facts of that case came to the conclusion that the offence of criminal breach of

trust is not in respect of property belonging to the partnership but is an offence committed by the person in respect propriety which has been specially entrusted to such a person and which he holds in a fiduciary capacity.

(12) Ln the present case, from the averments in the complaint and the presummoning evidence it is apparent that by way of a special agreement the sale proceeds of the partnership premises were agreed to be distributed among the partners and also meet the other liabilities and the amounts have been specifically mentioned. It shows that by way of this special agreement it has been agreed that the partners have got definite amounts to be received and it cannot be said that it was a general and undefined partnership property and any of the partners can convert the same for his own use. More, so in this case there are other special factors which cannot be ignored. By way of agreement between the parties it was agreed that the partnership''s account No. 503 in the Indian Overseas Bank,Janpath Branch, New Delhi shall be operated only under the joint signatures of Shri Sushil Kanta Chakravarty, the petitioner herein and Shri Samarjit Chakravarty, the complainant and intimation to this effect who also given to the bank, but Shri Sushil Kanta Chakravarty, the petitioner herein flouting the instructions already given to (be bank and in connivance with Shri J.K. Sood, Sr. Manager of the Indian Overseas Bank, JanpathBranch, New Delhi succeeded in withdrawing a sum of Rs, 13,23,000 from that account by signing singly on the cheques. The act on the part of the petitioner reflects the dishonest intention of (his petitioner of misappropriation or converting to his own use this amount which was earmarked for payment to the different partners and to meet other liabilities. After the execution of this special agreement, it cannot be said that this amount ofRs. 24,00,000 remained the joint property of the partnership concern. Nodoubt, in the case of disputes between the partners with respect to the undivided assets of the partnership, the matter is of civil nature, but in such case whereby a special agreement the amount has been kept apart to be distributed among the partners and others specially mentioned therein, the accused cannot seek the protection that being a partner be has withdrawn this amount and is not criminally liable. The criminal proceedings as well as civil proceedings can continue to proceed together when there isa criminal breach of a special agreement between the parties and the amount has been specifically earmarked. Whether there was any special entrustment of the property or that the accused was holding any property in a fiduciary capacity or not, at this stage it is neither possible nor desirable to express any opinion on merits of such plea. However, about the existence of a special agreement between the parties, on prima facie ground from the complaint and from the pre-summoning evidence it is apparent that it is by way of a special agreement duly entered into between the partners that out of Rs. 24,000,000 Shri Sushil Kanta Chakravarty, the petitioner herein being one of the partners is entitled to Rs. 2,53,000;Shri Samarjit Chakravarty, the complainant is entitled to Rs. 1,50,000; Smt.Arati Chakravarty. the third partner is entitled to Rs. 1,50.000 towards dues of Gee Vee Construction limited Rs. 1,25,000,-towards Capital Gains tax advance

payment Rs. 7,00,000; towards payment to Espi Industrial Corporation for payment of Chinar Export/Sales Tax/Misc. Creditors-Rs. 5.50,000;towards payment to Syndicate Bank for loan against Jeep No. Ded 4708Rs. 5,000 ; towards Canara Bank Security Deposit amount Rs. 1,70 000 ;and Sales Tax Rs. 1,00,000. The amount of Rs. 24,00,000 has been detailed to be distributed in a specified manner and it cannot be said that Shri Sushil Kanta Chakravarty, the petitioner herein being a partner was entitled to withdraw any amount from this account and convert the same for his ownuse.

(13) Under these circumstances, I find no illegality or infirmity in the order passed by the learned Metropolitan Magistrate on 9.4.1991 summoning Shri Sushil Kanta Chakravarty, petitioner herein to face trial under Section403 Indian Penal Code and Shri J.K. Sood, respondent No. 3 to face trial u/s 120B Ipc, This petition is, Therefore, dismissed.

