

Jaikrishna Vs. Crown and anr.

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SooperKanoon Citation : sooperkanoon.com/338280

Court : Mumbai

Decided On : Aug-18-1949

Reported in : AIR1950Bom99; 1950CriLJ607

Judge : Hemeon, J.

Appellant : Jaikrishna

Respondent : Crown and anr.

Judgement :
ORDER

Hemeon, J.

1. The applicant Jaikrishna of Anjan-gaon was convicted and sentenced to undergo four months rigorous imprisonment under B. 406, Penal Code by the Second Class Magistrate, Daryapur; and in appeal the appellate Magistrate, Amraoti, affirmed the conviction but reduced the sentence to a fine of bb. 600. The applicant has now come up in revision to this Court.

2. Although the complainant Mohanlal (P.W. 1) claimed that the applicant was his servant and in that capacity used to sell, buy or pawn gold and silver in Amraoti and elsewhere in his behalf, the trial Court found that they were partners. The trial Court also found that the applicant had misappropriated the following : (i) Rs. 300 on 10th September 1946, (ii) Rs. 642 on 8th October 1945. (iii) Rs. 400 and

BSection 1662 on 19th January 1946, (iv) a gold kardora worth Rs. 600 on 7 th October 1945.

3. The appellate Magistrate found in his own words and figures:

It is thus clear that the appellant misappropriated the kardora (worth about Rs. 600) and Mohanlal got only Rs. 300 against that. He also misappropriated Rs. 643 in respect of the todas. He further misappropriated a little less than Rs. 2000 out of the cash cum-ubara account of Mohanlal. He also borrowed Rs. 150 from Ramkrishna without Mohanlal's authority and obviously misappropriated the amount. He credited Rs. 300 less in respect of the first pawn with Ramakrishna. The credit of Rs. 1025 does not cover all these defalcations. Thus he has committed criminal breach of trust in respect of over Rs. 2300 (for which he has failed to give any plausible explanation).

4. An important question for determination in a case of this kind was whether the matter was one for adjudication by a civil and not by a criminal Court, more especially as it was found that the applicant was not, as Mohanlal alleged, his servant but his partner.

5-8. [His Lordship reviewed the evidence and held that the applicant was the partner of the complainant. His Lordship then continued:]

9. In spite of all of this, Mohanlal prosecuted the applicant as a servant and not as a partner; and the conclusion that he had done so deliberately cannot be avoided. He was presumably aware of the peril to which he would have been exposed by moving a criminal Court to take action Under Section 406, Penal Code against a partner and he accordingly attempted to circumvent it by falsely showing that the applicant was a mere employee. Although this stratagem did not succeed directly, it bore fruit indirectly in that the applicant was convicted. This was remarkable enough and due to the fact that the Courts below failed to realise and appreciate the somewhat obvious position that Mohanlal was aware that the cause in reality was one for a civil Court and that his only real chance of success in a criminal Court lay in having the appellant treated as his subordinate and not as his compeer.

10. The trial Court did not consider this aspect of the matter at all; and the appellate Court satisfied itself by making the following remark:

Dishonest dealing by a partner, however, are not immune from or criminal liability, and there can be a normal breach of trust by a partner as well,

This observation may well have been founded on the note at page 997 of Ratanlal's 'Law of Crime'. Edn. 17 to the effect that the words of Section 406 are wide enough to include the Case of a partner, if it be proved that he was in fact entrusted with the partnership property, Of with a dominion over it, and has dishonestly misappropriated it or converted it to his own use.

11. This was a rule laid down by a Full Bench in Queen v. Okhoy Coomar 18 Beng. L. S. 807 : 21 W. B. 69 P. B. but in examining that case a Division v. Girdharilal 60 Ool. 1816 : A.I.R. 1933 Cal. 683 : 34 Cri. L.J. 958 said at pages 1326, 1827 :

I have no doubt that it is correct so far as it goes, but no indication is given in the judgment to show how, or in what circumstances, a partner can be said to have been entrusted with partnership property, or with dominion over it, or to have misappropriated or converted it, and it is difficult to conceive how such a situation could arise. The learned Judges did not decide that such a situation had arisen in that case, but only that if it did arise on appropriate facts, then the section was wide enough to cover it.

A partner who receives money belonging to the partnership on account of himself and his co-partners, does not do so in a fiduciary capacity, Piddocke v. Burt (1894) 1 Ch. 343 : 63 L. J. Oh. 246

No criminal prosecution is sustainable by one partner against another for stealing, or embezzling or obtaining by false pretences, or misappropriating the property of the firm. Lindley on Partnership, Edn. 9 page 559 and the cases referred to in note (a), especially Beg. v. Loose (1860) 29 L.J.M.O. 132 : 2 L. T. 254 (stealing) ; Reg. v. Isaac Mark Evans (1863) 9 Jur. 184 (false pretences) and Bag v. Brett (1863) 9 Cox OC 398 : 83 L. J. M. C. 59 (embezzlement). This disability has been removed

in England by 31 & 32 Vict. c. 116, nor replaced by Section 40 (4), Larceny Act 1916, but no similar legislation has been enacted in India.

Partners are joint-owners or co-owners of the partnership property, that is to say, of the common stock. Section 253 (1), Indian Contract Act. Each partner is co-owner of the whole of this common stock, though he receives or pays a share only in profits and losses arising therefrom, and though his share in the partnership property is only the value of his original contribution, increased or diminished by his share of profit or loss. It is difficult, therefore, to conceive how he can be entrusted with, or with dominion over his own property, or how he can dishonestly misappropriate it or convert it to his own use.

12. Commenting on Beaumont J.'s view in *Emperor v. Jagannath Baghunathdas* 33 Bom. L.R. 1618 : A.I.R. 1932 Bom. 572 : 33 Cri. L.J. 317 that a partner might be entrusted with dominion over the partnership property, Lord-Williams J. observed:

I am unable to appreciate the distinction which he drew. The English cases were not cited to the Court, nor were the incidents arising from the law of partnership discussed in the judgment. Moreover, the decision is marred by the fact that the learned Judge's mind seems to have been much affected because the accused himself did not give evidence to rebut the charge, or to show that his intention was honest. It must have escaped the learned Judge's attention that our procedure does not provide the accused with any such opportunity, and to require him to defend himself offends against the fundamental presumption which underlies the administration of the criminal law both here and in England.

13. He also pointed out at page 1828 that although under Ss. 403 to 409, Penal Code many classes of persons are specifically mentioned, no reference is made either in the sections, or in the numerous illustrations thereto, to partners, and that the illustrations refer to persons entrusted absolutely with property of another, and not to property which belongs either partly or wholly to the accused,

14. *Manmohandas v. Mohendra Bhowal* A.I.R. 1948 Oal. 292 : 49 Cri. L.J. 543 another Division Bench of the same Court held that a partner cannot be

prosecuted Under Section 406, Penal Code for withholding the share of the profits to which the other partner is alleged to be entitled, if it is not shown that he did not hold the property or receive the money in a fiduciary capacity; that one partner cannot sue another for his share of the property and that if he desires to claim what he alleges was due him from the other partner he must file a partnership suit, claim a dissolution of partnership, an account and payment to him of what is found due on taking the amount,

15. Although this view seemed to contain an implication that there might be instances in which a partner held partnership property in a fiduciary capacity. I do not think that it was in-tended. In holding that a partner who receives money belonging to the partnership on account of himself and his co-partner does not do so in a fiduciary capacity, the Division Bench in Bhupendranath v. Girdharilal : AIR1933 Cal882 relied on Piddocke v. Burt (1891) 1 Oh. 343 : 68 L.J.Oh. 246 in which it was held that a partner who receives the assets of a partnership on account of himself and his co-partners is not liable to imprisonment under the Debtors Aofc, 1869, as a person acting in a fiduciary capacity. This decision was, as far as I am aware, never overruled and it is cited with approval in four places in Lindley's 'A Treatise on the Law of Partnership' Edn. 10, 1985.

16. Mohanlal's complaint should, therefore, have been rejected as untenable in a criminal Court as soon as it was clear that tha applioant was not his servant but his partner. The real position seems to have been realised by the police who investigated the case on Mohanlal's report and decided not to prosecute the applicant. The latter bad as a partner authority to deal with the assets of the partnership and Mohanlal had aoquiesced in what he had done. His only remedy was to file a suit for dissolution of the partnership and rendition of accounts, and his recourse to a criminal Court was manifestly due to his desire to put pressure on the applicant.

17. The conviction and sentence are set aside and the fine if paid by, shall be refunded to the applicant Jaikrishna.