

Kailash Nath Vs. State

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Court : Delhi

Decided On : Jan-08-1968

Reported in : 5(1969)DLT426; ILR1969Delhi178

Judge : Hardayal Hardy, J.

Acts : [Indian Penal code, 1860](#) - Sections 420

Appeal No. : Criminal Revision Appeal No. 465 of 1968

Appellant : Kailash Nath

Respondent : State

Advocate for Pet/Ap. : S.N. Anand and; V.D. Misra, Advs

Judgement :

Hardayal Hardy, J.

(1) The petitioner in this case is being prosecuted in the court of a magistrate on a charge-sheet submitted against him by the poUce for offences under sections 406, 420 and 477A Indian Penal Code. On 8th April, 1968 the learned magistrate framed charge against him on consideration of the documents referred to in section 173 of the Code of Criminal Procedure for the offences in respect of which police report had been submitted against him. The petitioner felt aggrieved by that order and preferred a revision against the same in the Court of Sessions Judge,

Delhi. The petition was heard by an Addl. Sessions Judge who dismissed the same on September 2, 1968 holding that the charges framed against the petitioner were not groundless. It may however be mentioned that the revision petition was heard by the learned Additional Sessions Judge in the absence of the petitioner's counsel.

(2) The petitioner has now come up to this Court with an application under sections 561A and 439 Criminal Procedure Code and it has been contended on his behalf of his learned counsel that the order passed by the learned magistrate framing charges against him was wholly illegal, unjust and improper as there was absolutely no material on the record to justify that course.

(3) Having heard arguments on behalf of the petitioner and the State and having also examined, carefully all the documents referred to in section 173 Criminal Procedure Code namely, the First Information Report recorded under section 154 Criminal Procedure Code, the documents on which the prosecution proposes to rely, including the statements recorded by the police under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as witnesses, I am of the view that the charge framed against the petitioner in respect of offence under sections 406 and 477 is groundless and deserves to be quashed.

(4) The prosecution case owes its origin to an application made by one Shrimati Sant Kaur and her husband S. Jagat Singh to the police on 24th October, 1966 wherein they complained that the petitioner had cheated them in the sum of Rs. 20,000.00 According to that application the said amount had been deposited by them with the firm Harnarain Gopinath against a promissory note executed on 5th June 1964 in favor of Shrimati Sant Kaur. The said promissory note was signed by the present petitioner who had described himself as joint proprietor of the firm. The complainants further stated that they had deposited the said amount on the faith of the assurances and promises made to them the money deposited by them would be re-paid like the bank call deposits. They complained that a few days before filing the application the said promissory note for Rs. 20,000.00 was presented for payment and that on presentation of the said promissory note the petitioner asked his munim Jai Chand to verify the amount. The munim looked into a secret

account book which was in his custody and acknowledged and confirmed the same but in spite of such confirmation the proprietors/partners refused to make payment on false pretences and even interest had not been paid by them.

(5) The complainants also stated that the manner in which the munim had verified and acknowledged the debt from a secret book of account created suspicions in their mind and had led them to believe that the firm had been maintaining false and duplicate sets of account books and there had been willful falsification of accounts with intent to defraud and defeat the interest of the creditors. The application further mentioned that the firm and its proprietors had in collusion with others and in pursuance of a criminal conspiracy to cheat and defraud the public received a huge sum of money running into lakhs of rupees from several other persons by way of loans or deposits with the dishonest intention of not repaying the same and had, with a view to defraud and defeat the interest of the creditors, willfully prepared false accounts.

(6) It appears that besides the present complainants namely B Shrimati Sant Kaur and her husband, certain other complaints had also been filed against the petitioner and his firm whereupon F.I.R. 774 of 1966 under sections 406 and 420 Indian Penal Code had been registered at the police station Parliament Street New Delhi a year before the registration of the present case. During the course of investigation of that case the premises of the firm as well as the house of the petitioner were searched and certain records were seized and removed by the police. A scrutiny of those records showed that no entry pertaining to the receipt of Rs. 20,000.00 from Shrimati Sant Kaur and her husband in respect of which the promissory note was executed by the petitioner was to be found in the regular books of account of the firm. There was however such entry in another book of account maintained by the firm, but the same was not available either at the premises of the firm or at the residence of the petitioner. This gave rise to the belief that the firm had been maintaining duplicate books of account.

(7) The contention urged on behalf of the petitioner is that on the allegations made in the complaint itself the relationship of debtor and creditor was created between the parties and as such there was no question of any offence having

been committed by the petitioner. Learned counsel also submitted that the prosecution case as made out in the documents submitted by the police showed that the petitioner was a joint proprietor of the firm Harnarain Gopinath; in other words his position was that of a partner. Admittedly the amount given by the complainants Shrimati Sant Kaur and her husband had not been given to the petitioner and his firm in trust. There was therefore no question of any criminal breach of trust on their part within the meaning of section 405 I.P.C. The charge under section 406 Indian Penal Code . was under the circumstances wholly misconceived. Such a charge was also incompatible with a charge under section 420 Indian Penal Code . because in a case where the accused is alleged to have obtained money from the complainant by means of trick, fraud or misrepresentation there can be no question of any entrustment. Mr. V. D. Misra, learned counsel for the State, conceded the position that the two charges, one under section 406 and the other under section 420 ' could not stand together. He however submitted that charges for these offences could be framed in the alternative under section 236 Criminal Procedure Code . An examination of the charges framed in the present case, however, shows that the charges against the petitioner have not been framed by the learned magistrate in the alternative. One of the two charges will therefore have to be dropped and it is the charge under section 406 Indian Penal Code . which must be dropped because in the absence of a specific agreement entrusting a partner with a specific item of property a partner cannot be held to be guilty of an offence of criminal breach of trust even in respect of a partnership asset. It would have been open to the prosecution to ask for a charge for an offence under section 406 Indian Penal Code being framed against the petitioner if there was evidence to show that the petitioner had been enabled to acquire dominion over the sum of Rs. 20,000.00 as a result of entrustment either on the part of the complainants in this case or by other partners of the firm. No such evidence is to be found on the record of this case. The position regarding a charge for the offence of falsification of accounts is still simpler. The petitioner is admittedly not even a working partner of the firm. His status in the firm is that of a partner who has not only invested his capital but is also managing the affairs of the firm. An offence under section 477A Indian Penal Code . can only be committed by somebody who is in the employ of another

person as a clerk or officer or servant. The falsification can only be committed in respect of the books of account of the employer.

(8) Mr. Misra, learned counsel for the State, however drew my attention to a Bench decision of Calcutta High Court in *Mohindra Mohan Das v. Srish Chandra Das* (1) where it was held that when one partner was in charge of books of the firm the mere fact that he was a partner and not a clerk or servant a charge for falsification of accounts could still be framed against him in a properly proved case. The decision appears to me to run counter to the plain language of section 477A Ipc and was not followed even by a single Judge of that court in *C. V. Krishnan V. Virji Kunverji and another* (2). Its authority would also appear to have been considerably taken by two other decisions of the same Court viz. *Bhuban Mohan Das v. Swendra Mohan Das* (3). and *Man Mohan Das v. Mohendra Bhopal* (4). The first is a Full Bench decision of that Court in which it was held that except in a case where by special arrangement fiduciary obligations have been cast upon him a partner cannot be charged under section 406 of the Indian Penal Code in respect of a partnership property jointly belonging to him and the complainant-partner. The second is a Division Bench case in which it was held that one partner cannot be prosecuted under section 424 T.P.C. for his honestly or fraudulently concealing or removing the books of partnership and that the proper remedy in such a case is to claim dissolution of partnership and accounts in a properly framed suit. If therefore a partner cannot, in the absence of a special contract, be charged with an offence of criminal breach of trust or cannot be criminally prosecuted even if he fraudulently conceals or removes all the books of partnership, it is difficult to see how he can be prosecuted if he has made a false entry in one of the books of partnership.

(9) The argument seems to me to be un-answerable and is considerably reinforced by a decision of their Lordships of the Supreme Court in *Velji Raghavji Patel v. State of Maharashtra* (5), where the Full Bench decision in *Bhuban Mohan Das's* case has been approved. In the circumstances, the charge under section 477A will also have to be dropped.

(10) This takes me to the charge under section 420 Indian Penal Code. The contention of the learned counsel for the petitioner is that there is no evidence to support the complainants' allegations about any fraudulent mis-representation having been made by the petitioner. I am however not impressed by this argument at this stage. It is no doubt true that ordinarily when a person deposits money with another for the purpose of earning interest thereon the ordinary relation of a debtor and a creditor is created between the parties. From that, however, it does not necessarily follow that in every case where money is deposited by one person with another the question is one of civil liability only. The essential ingredient of an offence under section 420 Indian Penal Code is that there should be ab initio dishonest intention on the part of the accused to knock out money from the complainant by means of fraudulent representations. This intention can be proved not only by the oral evidence of witnesses but also by surrounding circumstances including circumstances which precede and follow the transaction whereby the complainant has been made to part with his money. It is not possible to say at this stage, that the charge against the petitioner for an offence under section 420 I.P.C. is entirely groundless. It is however quite possible that at the trial the petitioner may be able to show by cross-examination of witnesses and or by defense evidence that there was no intention on his part to cheat the complainants and that the transaction between the parties was one of civil nature. The framing of charge against the petitioner has no other significance except that there is a prima facie case which requires to be tried. It is no, indication of guilt of the person charged with the offence.

(11) With these observations the revision petition is accepted to the extent that the charge in respect of offences under sections 406 and 477A Indian Penal Code is quashed but the case against the petitioner for an offence under section 420 Indian Penal Code shall proceed. The petitioner is directed to appear before the learned magistrate on 3.2.1969.