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Court : Kerala

Decided On : Apr-04-1987

Reported in : [1990]68CompCas636(Ker)

Judge : S. Padmanabhan, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 91, 190 and 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 2, 405, 409, 415 and 420; [Indian Contract Act, 1872](#) - Sections 171

Appeal No. : Criminal Miscellaneous Case No. 101 of 1986

Appellant : Stephen

Respondent : Chandra Mohan and ors.

Advocate for Def. : S. Easwara Iyer and; M. Vijayakumar, Advs.

Advocate for Pet/Ap. : M.K. Damodaran,; John L. Akkara,; P.V. Mohanan,;

Disposition : Petition allowed

Judgement :

S. Padmanabhan, J.

1. The first respondent pledged some ornaments and on their security secured a loan from the Iritty branch of the North Malabar Gramin Bank of which the

petitioner is the manager, after executing an agreement also. The bank demanded the amount back and the first respondent remitted the same. But the ornaments were not returned by 'the petitioner for the reason that a loan transaction by another person for which the first respondent stood surety was not discharged. The first respondent prosecuted the petitioner before the Judicial First Class Magistrate, Mattannoor in C. C. No. 3 of 1986 for offences punishable under Sections 409 and 420, Indian Penal Code. The petitioner seeks to quash the complaint invoking the inherent powers of this court. The short question for consideration is whether the facts constitute offences under the above sections.

2. Section 409 involves criminal breach of trust by a public servant or by a banker, merchant or agent. In order to constitute criminal breach of trust as defined in Section 405 of the Indian Penal Code, there must be entrustment with property or with dominion over the same. Admittedly, there was entrustment of the ornaments. The other ingredients required are dishonest misappropriation or conversion of the property by the accused for his own use. Those ingredients are not there because the ornaments continued with the, bank as earlier and it was possessed only as security. The only difference is that when one transaction was closed, it was retained as security solely for another transaction. No question of misappropriation or conversion is involved. Dishonest use or disposal of the property in violation of any direction of law prescribing the mode in which the trust is to be discharged, or of any legal contract, express or implied, which the accused made touching on the discharge of such trust is also sufficient to constitute the offence. The argument was that the ornament was used by the petitioner, in his capacity as manager, as security for the transaction to which the first respondent was a surety, in violation of the provisions of the legal contract entered into at the time of the pledge. There is no such allegation specifically. Still, that contention also could be considered because such a case could be brought within the allegations.

3. Annexure 4 is a copy of the agreement executed by the first respondent at the time of the loan transaction. That agreement contains a provision by which the first, respondent authorised the bank to treat the ornaments not only as security for that loan transaction but also for any other transaction or liability towards any branch of the bank, existing or to be incurred in future. The liability of a surety is

joint and several with that of the principal debtor. Therefore, the liability as a surety also, whether existing or in future, comes within the ambit of the above provision in the agreement. The first respondent has no case that he is not having the liability towards the bank as surety for the loan transaction of another person. The action of the petitioner in treating the ornament as security for that transaction cannot, therefore, be said to be dishonest use or disposal in violation of the terms of the legal contract constituting an essential ingredient of the offence touching on the discharge of trust. The petitioner was only acting according to the terms of the agreement. Treating the ornament as security for another transaction coming within the purview of the agreement does not involve dishonest use or disposal in violation of a contract touching on the discharge of the trust.

4. Under Section 171 of the Indian Contract Act, in the absence of a contract to the contrary, bankers could retain, as a security for a general balance of account, any goods bailed to them. This right is available only to certain categories of persons. Others could do so only if there is an express contract to that effect. The argument on behalf of the first respondent was that annexure 4 contains a contract to the contrary as envisaged in Section 171 of the Contract Act and, therefore, that provision is not applicable. I was not able to find any such contract to the contrary. On the other hand, annexure 4 only contributes to the enforcement of the right under Section 171. Allegations in the complaint thus not only do not constitute an offence punishable under Section 409 of the Indian Penal Code, but specifically exclude that offence. Even without the relevant provision in annexure 4, the petitioner, on behalf of the bank, could have retained the ornament as security under Section 171 of the Contract Act, without incurring the risk of commission of an offence of criminal breach of trust because such retention is allowed by law and it does not involve breach of any term of agreement.

5. For offences under the Indian Penal Code just like many other offences, mens rea is an integral part of the crime. The word 'dishonestly' appearing in Section 405, Indian Penal Code, gives clear indication regarding necessity for the existence of the mental element. There is no allegation of any dishonesty against the petitioner who was only acting on behalf of the bank as its manager. He was only retaining the ornament on behalf of the bank under the belief that he is

entitled to do so until the entire liability of the first respondent is wiped off. Even taking for granted that he was not entitled to do so, it could only be taken as a bona fide assertion of a civil right and no offence is involved.

6. In order to constitute the offence of cheating as defined in Section 415 and made punishable under Section 420, Indian Penal Code, there must be the following ingredients : (1) fraudulent or dishonest inducement of a person by deceiving him, (2) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property or the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived, and (3) in cases covered by the latter part of item 2 above, the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property. The mental element is a strong and an integral part of the offences under the section. The allegations in the complaint do not constitute the mental element or any of the other ingredients constituting that offence. It follows that the allegations in the complaint do not constitute any of the offences.

7. Along with the complaint, the first respondent made an application for search and seizure of the ornaments from the bank and without any hesitation the Magistrate granted that prayer. The bank was searched and the ornaments were seized and produced in court. Search was ordered without issuing summons under Section 91 and without the satisfaction that it will not be produced if required by summons or requisition. The action of the Magistrate in this respect cannot be justified.

8. The Magistrate has taken cognizance without due application of mind to the allegations in the complaint in order to satisfy whether the allegations do constitute any offence. In order to satisfy the definition of Section 2(d) of the Code itself, the complaint should show commission of the offence. In order to constitute an offence, there must be some act or conscious omission which is made penal by any provision of law. Under Section 190 also, in order to take cognizance, the facts must constitute the offence. Taking cognizance on the basis of allegations which do not constitute any offence is illegal. Issue of process and the consequent

trial on the basis of such cognizance will be nothing short of abuse of the process of the court. The first respondent had no justification in filing the complaint. He was actuated by malafides. It is the duty of this court to avoid the harassment by the trial of such a case.

9. The petition is allowed and the complaint is quashed. The Magistrate will return the ornaments to the petitioner who is the accused.

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