

Bhuban Mohan Das Vs. Surendra Mohan Das

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Court : Kolkata

Decided On : Feb-26-1951

Reported in : AIR1951Cal69,55CWN541

Judge : Harries, C.J., ;Das, ;Banerjee, ;Das Gupta and ;P.B. Mukharji, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 405 and 406

Appeal No. : Special Bench Reference in F.B. Reference No. 2 of 1950 and Criminal Revn. No. 585 of 1950

Appellant : Bhuban Mohan Das

Respondent : Surendra Mohan Das

Advocate for Def. : Sudhansu Sekhar Mukherjee, ;Kishore Prosad Mookerjee and ;Birendra Narayan Sinha, Advs.

Advocate for Pet/Ap. : Debabrata Mookerjee, ;Biswanath Roy, ;Sambhunath Banerjee (Sr.) and ;Ajoy Kumar Basu, Advs.

Judgement :

Harries, C.J.

1. This is a Reference to a F. B. made by a Bench of this Court in a criminal matter.

2. A petn. in revn. was heard by the Bench which has referred this case in which the petnr. prayed that certain proceedings instituted against him under Section 406, Penal Code, and which were then pending in the Court of a Magistrate at Howrah should be quashed.

3. The petnr. and the opposite party who preferred the complaint were partners and it is said that they carried on business at a shop situate at No. 34 Bellillios Road, Howrah. The business was a business of selling ghee, butter and stationery articles. On 12-2-1950 communal disturbances took place in Howrah and according to the complainant the petnr. proposed to him that all the articles in the shop should be removed to the petnr.'s house at 29/2 Beniatolla Lane, Calcutta which was outside the danger zone. The complainant stated that he agreed whereupon the petnr. procured a taxi cab and loaded it with articles which were in the shop. The communal disturbances passed off and according to the complainant he went to the petnr.'s house on 1-3-1950 to collect the articles and bring them back to the shop. The petnr., it is said, told the complainant that he would return the articles in two or three days' time, but this he did not do. On 15-3-1950 the complainant stated that he again went to the petnr.'s house to obtain the articles and he was then told by the petnr. that he had no knowledge of the articles at all.

4. On behalf of the petnr. it was contended before the Bench that no proceedings under Section 406, Penal Code could lie in this case as the parties were partners. The point appears to have been taken before the learned Magistrate, but he had overruled the objection and framed a charge.

5. The Bench found that the authorities of this Court on this matter were in conflict and being unable to resolve the conflict the case was referred to a F. B. The points formulated for decision by the F. B. were as follows :

(1) Can a charge under Section 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 ?

(2) Are Queen v. Okhoy Coomar, 13 Beng. L. R. 307 : (21 W. B. Cr. 59 F. B.) & Alia Rakha v. Liakat Hossein, : AIR1940 Cal371 , correctly decided ?

6. The reference first came before a F. B. of three Judges. But as the correctness of the earlier F. B. case of Queen v. Okhoy Coomar, 13 Beng. L. B. 307 : (21 W. B. Cr. 59 F. B.) had to be considered the matter was adjourned & has now come before this F. B. of five Judges.

7. Section 406, Penal Code, provides :

'Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to 3 years, or with fine or with both.'

8. The phrase 'criminal breach of trust' is defined in Section 405, Penal Code, in these terms :

'Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust or wilfully suffers any other person so to do commits 'criminal breach of trust'.'

9. It seems clear that before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property & that he has been guilty of 'breach of trust' using that latter phrase loosely. There must be entrustment & therefore the person accused must be shown to have held the property in a fiduciary capacity.

10. On behalf of the partner it has been argued that a partner does not in the ordinary course hold partnership property in a fiduciary capacity. The partnership property belongs to the partners. & one partner apart from any special agreement, has as much right to the property as any other partner. A partner who holds partnership property, it is said, holds it in his own right & it cannot possibly be said that he holds it in a fiduciary capacity.

11. The question whether a partner received or held partnership property in a fiduciary capacity was considered by the English Courts in the case of *Piddocke v. Burt*, (1894) 1 Ch. 343 : (63 L. J. Ch. 246) where it was held that one partner receiving assets of the partnership on account of himself & his co-partners is not liable to imprisonment under Section 4(3). Debtors Act, 1869 as a person acting in a fiduciary capacity.

12. The point which had to be considered in that case was whether a partner who had retained certain of the partnership assets could be said to have acted in a fiduciary capacity. At p. 346 Chitty J. observed :

'The case of a partner is quite different from these cases, because he receives money belonging to the firm on behalf of himself & his co-partners. & it appears to me that I should be straining the law if I were to hold that a partner receiving money on account of the partnership -- that is, on behalf of himself & his co-partners -- received it in a fiduciary capacity towards the other partners. The law allows one partner one of several joint creditors--to receive the whole debt on account of the firm to whom it is due, & I am unable to recognise any such distinction, as was endeavoured to be made by Mr. Church, between the case of a partner receiving money of the firm & not accounting for it, & that of a partner overdrawing the partnership account ; because if this distinction were true, it would apply to every case where one partner wrongly overdraws the partnership account.'

13. The learned Judge having held that a partner who received payment of a debt due to the partnership firm did not hold the money in a fiduciary capacity, held that no offence had been committed under the Debtors Act.

14. If a partner who receives money on behalf of the partnership does not receive it in a fiduciary capacity then it appears to me that he could not be charged with fraudulent breach of trust by reason of his failing to account for that money. Similarly, if a partner is holding property belonging to the partnership, he is holding it as one of the partners entitled to hold it &, therefore, I think it could not be said that he was holding it in a fiduciary capacity, that is, as a kind of trustee for himself & his other partners. If he could not be said to be holding the property in a fiduciary capacity then it is difficult, & indeed impossible, to hold that he could be said to

have been entrusted with that property.

15. It is quite clear that at common law in England a partner could not be charged with larceny of partnership property, neither could he be charged with embezzlement of such property. As agent of the firm a partner could be said to have received property on behalf of the firm & if he did not account for it, it could be said that he as an agent or servant of the firm had embezzled the money. Nevertheless at common law he could not be prosecuted for embezzlement. To meet the difficulty a special section was enacted in the Larceny Act & thereafter a partner could be prosecuted for larceny or embezzlement of partnership property. Under the old common law it was impossible to charge a partner with larceny because the property alleged to have been stolen was as much the accused's property as the property of the other partners. Similarly, the money said to have been embezzled was as much the accused's property as that of his co-partner. The difficulty was realised in English law & was met by the enactment of a special provision. But there is no such special provision in the Indian law.

16. The rights of partners in partnership property is dealt with by Lord Lindley in his book on Partnership, Edn. 10 at p. 415 in these words:

'In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property, but it is not quite clear whether they are interested therein as tenants-in-common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of the partnership property & to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved. What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised & converted into money, & all the partnership debts & liabilities have been paid & discharged. This it is, & this only, which on the death of a partner passes to his representatives, or to a legatee of his share.'

Again at p. 419 Lord Lindley observed :

'From the principle that a share of a patnr. is nothing more than his proportion of the partnership assets after they have been turned into & applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real & personal representatives of a deceased patnr., be deemed to be personal & not real estate.'

17. From these observations, it is clear that the share of a patnr. in the partnership assets cannot be predicated until an account has been taken & all the debts have been discharged. Until that has been done, it cannot be said that a partnership asset belongs to any particular patnr. or that any particular share of it belongs to any particular patnr. That being so, if one patnr. retains a partnership asset can it be said that property belonging to somebody else has been entrusted to him, or at least the share of his co-patnr. has been entrusted to him? It may be that two persons each own a half share in a partnership & at first sight it might appear as if each would own a half of every asset of the partnership. However, that by no means follows, because if at any given moment the partnership account was taken & the debts discharged, it might be that the assets belonged wholly to one of the patnrs., or indeed after payment of debts there might be no assets at all for any of them. It is, therefore, impossible to say at any given moment before accounts have been taken, what share, if any, a patnr. has in the property. Until dissolution & accounts each patnr. must be regarded as having a right to the property & he does not hold it in a fiduciary capacity.

18. It seems to me that if a patnr. is to be charged under Section 406, Penal Code, it must be held that property belonging to somebody else was entrusted to him. A partnership firm has no existence apart from the patnrs. & is not an entity like a limited company which can own property. If a patnr. holds partnership property it cannot be said that he has been entrusted with his own share in the property if he had any share in it. But can it be said that the patnr. has been entrusted with the other patnr.'s share? The question immediately arises what is the other patnr.'s share, & as pointed out by Lord Lindley, he has no definite share until the accounts have been taken & the debts discharged & the assets divided according to the partnership agreement. That being so, it appears to me that it cannot be

said that a patnr. who received partnership property is entrusted with his co-patnr.'s share of that property to bring the case within Section 406, Penal Code.

19. The rights of a patnr. in any particular asset was considered by their Lordships of the P. C. in the case of *Gopala Chetty v. Vijayaraghavachariar*, (1922) 1 A. C. 488 : (A. I. R. (9) 1922 P. C. 115) in which it was held that if a partnership had been dissolved but no account had been taken, the proper remedy of a patnr. in respect of an asset received by another patnr. was to have an account taken & if his right to sue for an account was barred by limitation he could not sue the patnr. who had received the asset for a share of it. Their Lordships of the P. C. in other words held that even after a partnership had been dissolved a patnr. cannot sue another for a definite share in an asset because it is not known whether he has a share & if he has, what the extent is unless an account has been taken & the debts have all been paid. If even after dissolution, a patnr. could not sue another patnr. for his share of an asset then it seems to me quite impossible to suggest that the patnr. who retained that asset was holding at least a share of that asset in a fiduciary capacity on behalf of his co-patnr. Unless the relationship of partnership imposes on one patnr. holding property fiduciary obligations, then it appears to me that it cannot be said that that patnr., if he holds property of the partnership with the consent of the others, has been entrusted with it, & that he is guilty of a fraud on his trust in not accounting to his co-partners for the property.

20. This matter has been considered by this Ct. in a number of cases. The first case is the case of *Lall Chand Roy*, 9 W. R. (Cr.) 37. There the accused was convicted of criminal breach of trust in respect of the value of goods which had been entrusted to him to sell. It was urged before the H. C. that the conviction could not be sustained, as the accused was a patnr. with the prosecutor. It was held by Kemp & Mitter JJ. that being a patnr. he could not be prosecuted. Jackson J. took a different view, but not upon the law. He held that it had not been shown that the accused was a patnr. This case was considered by a F. B. of this Ct. in the case of *The Queen v. Okhoy Coomar*, 13 Beng. L. R. 307 : (21 W. R. (Cr.) 59 F. B.). In that case a Mag. relying upon the decision in the petn. of *Lall Chand Roy*, 9 W. R. (Cr.) 37 to which I have just made reference discharged the accused on the ground that they could not be prosecuted for an offence under Section 405,

Penal Code. A revn. petn. from the order of the Mag. came before a Bench of this Ct. which thought that the decision in Lall Chand Roy's case, (9 W. R. (Cr.) 37) needed consideration & referred the following question to a F. B. :

'Whether, if a patnr. dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of any of the partnership property which he is entrusted with, or has dominion over, he is guilty of an offence punishable under the Penal Code?'

21. A F. B. consisting of five Judges came to the conclusion that the case of Lall Chand Roy, (9 W. R. (Cr.) 37) could not be supported & directed that the order of discharge of the learned Mag. should be set aside & that he should enquire into the merits & decide whether or not an offence had been committed. The question submitted to the F. B. was answered in the affirmative. But it is by no means clear in what circumstances the F. B. were of opinion that an offence would be established. They observed at p. 311:

'If it be made out by the evidence, that one patnr. was entrusted by his co-patnrs. with property or with a dominion over it, & that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence.'

22. Of course if it could be made out that one patnr. had been entrusted with property or with dominion over it no difficulty would arise. But the question WE have to consider is whether or not a patnr. who receives partnership property without any special agreement can be said to have been entrusted with that property or with dominion over it. A patnr. who receives partnership property has dominion over that property quite apart from any arrangement with his other patnrs. The fact that he is a patnr, gives him dominion over the property & if the English view be right he does not hold that property in a fiduciary capacity. It may be that by special arrangement between the parties One patnr. could be regarded as being entrusted with property. But apart from such special arrangement, it cannot be said that a patnr. who receives partnership property on behalf of his patnrs. has been given dominion over that property by his co-patnrs. or has been

given dominion over the share of his co-partners. by the latter. This F. B. case is certainly authority for the proposition that in some circumstances a partner. can be charged under Section 406, Penal Code. But it is not very helpful, with great respect, to a Ct. which is called upon to decide whether a partner. receiving a partnership asset in his capacity as a partner. is guilty of fraudulent breach of trust if he did not account for it.

23. The F. B. never seems to have considered that there is really no partner's share in the property until an account & it may well be that a partner. who retains an asset, is entitled not only to his share according to the partnership agreement in that asset but on taking an account it may be found that he is entitled to the whole of the asset & considerably more. In such a case how can it be said that he has been guilty of a breach of trust & has acted dishonestly towards his co-partners., if an account would show that he was entitled to everything which he had retained ?

24. This F. B. decision has been considered in a number of Bench decisions. In the case of *Debi Prasad v. Nagar Mull*, 35 Cal. 1108 : (9 Cr. L. J. 74) it was held that a partner. was entitled to be called upon for an account of the expenditure of the money which he had received & it was open to him to spend the money received by him & to account for it in dealing with the partnership. Where it was not satisfactorily made out that this was not done, & could not be made out in the absence of a proper demand for accounts, it was held that there was no dishonest conversion which would justify his conviction under Section 406, Penal Code. At p. 1110 the learned Judges observed :

'But considering that there was a partnership existing at this time, the accused was plainly entitled to be called upon for an account of the expenditure of the money, which he had received, for, as the contract was one of partnership & not of bailment, it was open to the accused to spend the money he had received & to account for it in dealing with the partnership.'

This view clearly supports the partner. in the present case. If a partner. could be said to have been entrusted with the money it would not have been open to him to spend the money which he had received & to account for it in the accounts of the partnership. 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 & claim to account for it at some later stage.

25. The matter again came before the Ct. in the case of Bhupendranath v. Giridharilal, : AIR1933 Cal582 in which it was held that when a patnr. was proved in fact to have been entrusted with the partnership property or with dominion over it, & had dishonestly misappropriated it or converted it to his own use, he could be convicted of an offence under Section 405 or rather 406, Penal Code. But the Bench added that it was difficult, however, to conceive how such a situation could arise. It was further held that each patnr. was co-owner of the whole of the common stock, though he received or paid a share only in profits & losses arising therefrom, & it was difficult to conceive how he could be entrusted with, or with dominion over his own property or how he could dishonestly misappropriate it or convert it to his own use.

26. This case followed the F. B. in that it held that there were circumstances in which a patnr. might be guilty of an offence under Section 406, Penal Code. But the view of the Bench is clear that in ordinary cases where a patnr. receives money or property of a partnership or holds property or money of a partnership, he does not receive or hold that property in a fiduciary capacity & if he spends it he cannot be guilty of the crime of fraudulent breach of trust. The remedy is an account & in that account the patnr. who has retained the money or property must account for it in ascertaining what his share of the partnership assets will be.

27. In a later case, Alia Rakha v. Liakat Hossain, : AIR1940 Cal371 a Bench of this Ct. took a somewhat different view from that taken in Bhupendranath Singha's case : AIR1933 Cal532 . The Bench held that it was not the law that in no case can charges under Sections 403 to 409, Penal Code, be framed against a person who is a patnr. & is accused of offences under those sections in respect of partnership property. The learned Judges observed :

'The words of Section 405 are large enough to include the case of a patnr. if it be proved that he was in fact entrusted with the partnership property or with dominion over it & has dishonestly misappropriated it or converted it to his own use.'

The learned Judges, however, do not state whether in their view a partner who receives partnership property or money on behalf of the partnership can be said to have been entrusted with it & therefore guilty of fraudulent breach of trust if he does not dispose of it in accordance with the trust or arrangement. It seems that in the case of *Alia Rakha, v. Liakat Hossain*, : AIR1940 Cal371 the Bench were not inclined to follow the view expressed in *Bhupendranath Singha's case* : AIR1933 Cal582 .

28. In the case of *Man Mohan Das v. Mohendra Bhowal*, 52 C. W. N. 441 : (A. I. R. (35) 1948 Cal. 292 : 49 Cr. L. J. 543), a Bench of this Ct. held that a partner who received money on behalf of the partnership did not receive it in a fiduciary capacity. Consequently, when one partner was alleged to have withheld the share of the profits of the partnership business said to be due to another partner he could not be prosecuted for an offence under Section 406, Penal Code.

29. This case was somewhat different from the others The partner prosecuted was alleged to have withheld the complainant's share of the partnership profits. But it is clear that partnership profits are not ascertainable until an account has been taken & it cannot be said until such an account that any partner has any share in such profits. I think this later case is clearly right because it could not possibly be said that a partner or partners had been entrusted with another partner's share of the partnership profits before it could be said whether any profits existed or not & such could not be said until an account had been taken. The last case is the case of *Rahaman v. R. D. Khambatta*, 50 Cr. L. J. 154 : (A. I. R. (36) 1949 Cal. 89) in which the view was taken that in ordinary circumstances a partner could not be prosecuted under Section 406, Penal Code, for fraudulent breach of trust in not accounting for partnership property.

30. Bombay has taken a view that a partner may be prosecuted under Section 408, Penal Code, for failure to account for partnership moneys or assets. In *Emperor v. Jagannath Ragkunathdas*, 33 Bom. L. R. 1518 : (A. I. R. (19) 1982 Bom 57 : 33 Cr. L. J. 317), a Bench held that the words of Section 405, Penal Code, were wide enough to cover the case of a partner. Where one partner was given authority by the other partners to collect moneys or property of the firm, he was entrusted with

dominion over that property; and if he dishonestly misappropriated it he came within the section. The Bench, however, added that the Ct. should be very careful in dealing with charges against patnrs. of criminal breach of trust. It was impossible to say in many cases what the share of the accused might be, whether the accused was indebted to the firm or whether the firm was indebted to him. If the firm was indebted to him there might be no dishonest intent in his withdrawing money from the firm. If there was any doubt upon the matter, the accused must always have the benefit of the doubt.

31. The Bench of the Bombay H. C. realised that whether or not there was a dishonest intent would depend upon a partnership account & the criminal Cts. which appear to be singularly inappropriate for taking partnership accounts were warned to be very careful. The Bombay case, however, does not consider the English authorities & does not consider whether or not a patnr. who receives money from a creditor of the firm holds that money in a fiduciary capacity. It seems to have been assumed by the learned Judges that the patnr. did, whereas as I have pointed out the English view was that the patnr. did not hold the money in a fiduciary capacity & it appears to me that the English view is correct & has been followed by a number of Benches of this Ct.

32. A view similar to the Bombay view has been taken by the Madras H. C. in the case of *Satyanarayanamurthi v. Kotha Manikyala Rao*, : AIR1940 Mad265 & by the Patna H. C. in the case of *Bhudhar Mal v. Ramchander*, 55 I.C. 674 : (A.I.R. (7) 1920 Pat. 112 : 21 Cr. L. J. 338). These cases do not advance the matter any further because the Benches merely purported to follow the F. B. case of this Ct. in *Queen v. Okhoy Coomar*, (13 Beng. L. R. 307 : 21 W. R. (Cr.) 59 F. B.)

33. Whether or not a patnr. 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 patnrs. then it could be said that a patnr. was entrusted with property or with dominion over it. For example, if by the terms of the partnership agreement one patnr. 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, & 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.

34. The only remedy of a co-partner is an account & until such an account is taken it cannot be said whether the co-partner has any interest at all in the asset or money. As pointed out in the case of *Gopala Chetty v. Vijayaraghavachariar*, (1922-1 A. C. 488: A.I.R. (9) 1922 P. C. 115), decided by their Lordships of the P. C., even after dissolution a co-partner has no right to sue for his share of an asset. It appears to me that if a co-partner has no right to sue to recover his share it cannot possibly be said that his co-partner is holding that share in trust for him. If the partner holds partnership property in a fiduciary capacity he would be holding it in trust for his co-partners & his co-partners could sue. But it has been laid down beyond all question that the co-partners cannot sue & that their only remedy is an account & to recover only what is ultimately found due on taking the account. It appears to me that in those circumstances it cannot be said that a partner who receives or holds property of a partnership is entrusted with the property or dominion over it, & that being so it appears to me that the answer to question 1 must be in the negative.

35. The answer to question 2 must be that these cases cannot be regarded as correctly decided if they lay down any general rules applicable to prosecutions of partners for offences under Section 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 patnr.

36. Under the rules of this Ct. the F. B. must not only answer the questions, but must decide the petn. It appears to me that the petn. must be allowed & the proceedings before the learned Mag. quashed because no entrustment could be established in the circumstances of this particular case.

37. In the result the petn. is allowed & the proceedings now pending in the Ct. of the learned Mag. at Howrah are quashed. The rule is accordingly made absolute.

Das, J.

38. I agree with my Lord the Chief Justice.

Banerjee, J.

39. I agree. (See separate judgment.)

Das Gupta, J.

40. I entirely agree with my Lord the Chief Justice.

P. B. Mukharji, J.

41. I agree with the conclusions & the reasonings given in the judgments of my Lord the Chief Justice & of my Lord Banerjee J. I would only wish to add a few more reasons to support the same conclusion.

42. The point for decision before the Ct. is can a patnr. be prosecuted under Section 406, Penal Code, for criminal breach of trust in respect of partnership assets. Sir Richard Couch C. J. delivering judgment for a F. B. of the Calcutta H. C. in the matter of Nrigendra Lall, 21 W. R. (Cr.) 59: (13 Beng. L. R. 307 F. B.) observed :

'We think the words in Section 405, Penal Code are large enough to include the case of a patnr. if it be proved that he was in fact entrusted with the partnership

property or with a dominion over it & has dishonestly misappropriated it or converted it to his own use. There is no reason that the case of a patnr. should be excepted from the operation of this section. Indeed there is every reason that it should be included in it. It is a question of fact whether there has been an entrusting of the property or giving a dominion over it sufficient to come within what is required.'

43. This decision was rendered in 1874 & has caused considerable anxiety for more than 70 years. On two main grounds the soundness of this decision has been questioned more than once. First the decision is said to be verbal & academic & its practical import is difficult to find. This decision gives no indication to show how it & under what circumstances a patnr. can at all be said to be entrusted with partnership property or with dominion over it or to have misappropriated & it is difficult, if not impossible, to conceive how such a situation can arise. This criticism is put on the ground of the law of partnership. In *Piddocke v. Burt*, (1894) 1 Ch. 343: (63 L. J. Ch. 246), it is held that a patnr. who receives money belonging to the partnership on account of himself & his co-patnr. does not do so in a fiduciary capacity. At Common Law in England no criminal prosecution can be maintained by one patnr. against another for stealing or embezzling by false pretexts or misappropriating property of the firm. Patnrs. are regarded in law as joint owners or co-owners of the partnership property. Secondly, Sections 403 to 409, Penal Code occur under 'offences against property' in chap. 17 of that Code, under the sub-heading 'Criminal misappropriation of property.' This group of sections deals with many classes of persons who are specially & specifically mentioned but they make no reference to a patnr. Section 407 Penal Code, deals with criminal breach of trust by carrier wharfinger or warehouse keeper. Section 408, Penal Code, refers to criminal breach of trust by clerk or servant. Section 409, Penal Code, refers to criminal breach of trust by a public servant or by Banker, merchant or agent. The case of a patnr. is not mentioned in any of these sections or even in the numerous statutory illustrations given thereunder. The statutory illustrations indicate persons entrusted absolutely with the property of another & not property which belongs either partly or wholly to the accused. If illustrations are any indication then these sections of the Penal Code are not intended to be applied to patnrs. Illustration (c) of Section 403, Penal Code, which

refers to joint owners of a horse & says that one of the joint owners can take the horse out of the possession of the other is of no assistance in this case because unlike the illustration the partnership account is a general account & is not confined to a specified item of property as the horse in the illustration. Then again in this connection a reference to Section 424, Penal Code, will show that there can be dishonest or fraudulent removal or concealment of one's own property because of the specific language used in that section namely 'property of himself or any other person.'

44. Some of these criticisms will be found in the judgment of Lord-Williams J. in *Bhupendra Nath v. Giridharilal*, : AIR1933 Cal582 . Harries C. J. in *Monmohan Das v. Mohendra Bhawal*, 52 C.W.N. 441 : (A. I. R. (35) 1948 Cal 292 : 49 Cr. L. J. 543) refers to this decision of Lord-William J. while holding that a patnr, who receives the money on behalf of the partnership does not receive it in a fiduciary capacity. The Bombay H. C. adopted the view of the Calcutta F. B. & Beaumont C. J. in *Emperor v. Jagannath Raghunathdas*, 33 Bom. L. R. 1518 : (A. I. R. (19) 1932 Bom. 57 : 33 Cr. L. J. 317) overruled the argument advanced on the basis of statutory illustrations of the Penal Code 4 come to the conclusion that the words of the section are wide enough to cover the case of a patnr. at pp. 1520 & 1521.

45. An analysis & survey of the various sections of the Partnership Act are necessary to discover the true nature, character & incident of partnership property. Section 19, Partnership Act discloses the implied authority of a patnr. to deal with partnership property to bind the firm. Section 24 of the same Act contemplates notice to the patnr. as notice to the firm except in the case of fraud on the firm committed by or with the consent of that patnr. But the sections relating to the property of the firm lay down the rules what such partnership property is & how is that to be applied. Section 15, Partnership Act, provides that subject to contract between the patnrs., the property of the firm shall be held & used by the patnrs. exclusively for the purposes of the business. Section 9, Partnership Act, enjoins each patnr. to be just & faithful to each other. Section 10, Partnership Act, requires that every patnr. shall indemnify the firm for any loss caused to the firm by his fraud in the conduct of the business while Section 13 of the same Act requires a patnr. to indemnify the firm for any loss caused to it by his wilful neglect in the

conduct of the business.

46. It does not appear to my mind that sections of the Partnership Act, relating to indemnification for the loss either for the fraud or wilful neglect of the partner. nor even the section where one partner. is required to be just & faithful to the other can lead to the conclusion that one partner. can commit the offence for criminal breach of trust as against the other partner. in respect of partnership property. The question here is of much broader application & of a more fundamental nature. Its fundamental nature is this that the very conception of partnership precludes possibility of entrustment or dominion of the partnership property by one partner. as against the other & therefore, precludes any possible operation of the crime under Section 406, Penal Code, of criminal breach of trust by one partner. against the other in respect of the partnership property.

47. In England the same difficulty arose & the disability was partially removed first by 31 & 32 vict. chap. 116 & now replaced by Section 40 (4), Larceny Act, 1916 but no similar legislation has been enacted in India. Section 40 (4), Larceny Act of 1916 (6 & 7 Geo. V chap. 50) provides as follows:

'If any person, who is a member of any co-partnership or is one of two or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners he shall be liable to be dealt with, tried, & punished as if he had not been or was not a member of such co-partnership or one of such beneficial owners.'

Further inroads on the Common Law in England were made by such Statutes as Section 24, Forgery Act 1861 (24 & 25 vict. Chap. 98) under which Act it was forgery to endorse a bill by procuration under a false & fraudulent assumption of authority so to endorse it. Under that section now repealed it was held in *R. v. Holden*, (1912) 1 K. B. 483: (81 L. J. K. B. 327) that a partner. who with intent to defraud & without lawful excuse or authority accepted a bill in the partnership name had accepted it in the name of another person within the meaning of that Statute & the distinction was sometimes a very fine one as will be seen from the decision of the English Ct. of Appeal in *Morison v. London County & Westminster Bank Ltd.*, (1914) 3 K. B. 356 at p. 381: (83 L. J. K. B. 1202). On behalf of the

resp. reliance was placed on the decision of *R. v. Warburton*, (1870) L. R. 1 C. C. 274: (40 L. J. M. C. 22). As will be apparent from the judgment of Cockburn C. J. in that case the ratio of the decision is that it is a criminal offence to deprive a patnr. of his interest in some of the partnership property by false entries & false documents. That is quite understandable because by falsifying entries a patnr's interest in the partnership property is affected forthwith irrespective of dissolution or general accounts & this case, therefore, is no authority for the proposition that a patnr. can be convicted of criminal breach of trust by another patnr. in respect of partnership property. Besides it was a case of conspiracy to cheat & defraud & it was immaterial whether the act agreed to be done was itself not criminal, so long as it was illegal. It is so also for criminal conspiracy under Section 120A, Penal Code. Incidentally it may be pointed out here that although at Common Law in England it was not a criminal offence for one co-owner of goods fraudulently to deprive the other co-owners of them, such co-owner being lawfully in possession (1 Hale P. C. 513) it was nonetheless possible that if he took them from a person who was a bailee for all the co-owners he could be convicted of larceny even though the bailee was himself one of the co-owners; *R. v. Bramely*, (1822) Russ. & By. 478 : (168 E. R. 907) & *R. v. Webster*, (1861) Le. & ca. 77: (169 E. R. 1311) & that apparently is still the law in any case which cannot be brought within the Larceny Act of 1916. But these in my opinion cannot alter the position of the patnrs' interest in respect of partnership property so as to make one patnr. liable for the offence of criminal breach of trust in respect of partnership property at the instance of another patnr.

48. The question before the Cts. in India can be dealt with in my view on the basis of the language used in Section 405, Penal Code, dealing with the offence of the criminal breach of trust. In this respect the matter is largely, if not wholly, one of construction. The generality & the amplitude of the expression 'whoever' in Section 405, Penal Code, prima facie would include a patnr. within the operation of this section. If there is any exclusion of the case of a patnr. from the operation of this section then such exclusion has to follow from other expressions used in that particular section. Such other expressions which are relevant in this context & from which such exclusion can be deduced are:

(i) 'In any manner entrusted with property.'

(ii) 'Any dominion over property.'

(iii) 'To his own use.'

(iv) 'In violation of any direction of law prescribing the mode in which such trust is to be discharged.'

(v) 'Or of any legal contract expressed or implied.'

49. The first question, therefore, for consideration is can a patnr. be said to be in any manner entrusted with partnership property as against the other patnr. or patnrs. In my view normally not. Section 15, Partnership Act, provides subject to any contract that the property of the firm shall be held & used by the patnrs. exclusively for the purposes of the business. That in my view means all the patnrs. as between themselves jointly hold & use the partnership property for the purposes of the business & no one patnr. can be said to be entrusted with the partnership property as against the other patnr. or patnrs. under the Ordinary incidents of partnership law under the Partnership Act.

49a. The second question is can a patnr. be said to have dominion over the partnership property as against the other patnr. or patnrs The same Section 15, Partnership Act, in my judgment precludes such idea. In the case of a partnership it is joint dominion by all the patnrs. over the partnership property.

50. These are the two primary conditions one of which must be satisfied before other elements of the offence under Section 405, Penal Code, need be considered. As in my view these two primary conditions cannot be satisfied in the case of a patnr. under the ordinary incidents of partnership law under the Partnership Act, no patnr. can prosecute his co-patnr. for criminal breach of trust in respect of partnership property.

51. The other expressions mentioned in what I have itemised above as (iii), (iv) & (v) may be applicable in the case of a patnr. against the co-patnrs. in respect of partnership property under the Partnership Act but they are of no avail when any

of the first two basic conditions of the offence cannot under such law be satisfied.

52. It is quite true that Section 15, Partnership Act, as well as many other sections thereof are subject to any special contract between the partners. Great liberty is given to partners to form their own contract of partnership & the terms of contract vary between one partnership & another. If therefore there is any special contract of partnership by the very terms of which either an entrustment is made of any specific property to another partner or any exclusive dominion given in respect of the same to one particular partner as against the others then such a case may in appropriate circumstances come within the operation of Section 405, Penal Code; except such kind of special contract therefore there cannot be criminal breach of trust by one partner as against the other in respect of partnership property.

53. What is often forgotten in this context is that the Indian Partnership Act is not a complete code on the law of partnership. It is a Statute to define & amend the law relating to partnership. The Act does not profess to consolidate the entire law on the subject. Until dissolution of partnership & accounts no specific item of property belongs to any particular partner as against the other. That is the peculiar character & incident & nature of partnership property. Section 48 lays down that in settling account of a firm after dissolution losses shall first be paid out of profits, next out of capital & lastly by the partners individually in proportions in which they are entitled to share profits. Then it is provided there that the assets of the firm should be applied first in paying debts of the firm to third parties, then in paying rateably what is due to a partner from the firm for advance as distinguished from capital, thirdly in paying to each partner rateably what is due to on account of capital & lastly the 'residue' if any shall be divided among the partners in the proportions in which they are entitled to share profits. The basic idea is ultimate participation in the partnership assets out of the 'residue' that is left & such 'residue' cannot be determined until after dissolution & accounts & until after losses & assets of the firm have been attended to in the manner laid down in the section. The same idea operates also in Section 52, Partnership Act, where a contract creating partnership is rescinded on the ground of fraud or misrepresentation of any of the parties thereto. There again the party entitled to rescind has the right to a lien on or a right of retention if the 'surplus' of the assets of the firm remaining after debts of the firm

have been paid, for any sum paid by him for the purchase of a share in the firm & for any capital contributed by him. He is also entitled to rank as a creditor of the firm in respect of any payment made by him towards the debt of the firm & to be indemnified by the patnr. or patnrs. guilty of fraud or misrepresentation against all debts of the firm. From these various provisions, it is, therefore, clear that the property of patnrs. in the partnership assets is a residuary or surplus property which remains after satisfaction of other claims on the firm. It is, therefore, not a specific & ascertainable property, until then.

54. The reason, therefore, of holding that a patnr. cannot be prosecuted by another patnr. for criminal breach of trust in respect of partnership property under Section 406, Penal Code, is two-fold. The nature, character & incident of partnership property are such that during the subsistence of the partnership there cannot be, except by special agreement with which we are not concerned here, any entrustment or dominion & secondly partnership property is not a specific & ascertainable property & is of so equivocal & problematic a nature until dissolution & accounts, that it is not susceptible to be used in a manner which can bring into operation Section 405, Penal Code. It is only when such ordinary character & nature of the partnership property are varied by special contract of partnership so as to create entrustment of any specific property in favour of one patnr. as against the others or so as to give exclusive dominion of such property to one patnr. as against the other that there can be any scope of application of Section 405, Penal Code.

Banerjee J.

55. I agree. To constitute the offence of criminal breach of trust there must be entrustment of property in respect of which the breach of trust is charged. It closely resembles the offence of embezzlement under the English law. The section requires entrusting any person with property or with any dominion over property. It further requires dishonest misappropriation or conversion of that property by the person charged, to his own use, or dishonest disposal of it. The offence consists of any one of four positive acts namely, misappropriation, conversion, user, or disposal of property.

56. Dishonest intention is the gist of the offence. It follows, therefore, that if there is no 'property' which is the subject-matter of entrustment, there cannot be any criminal breach of trust. Likewise if there is no dishonest intention, there is no offence committed.

57. In the judgment of the learned Chief Justice, the nature of a partner's property in the partnership assets has been discussed. That is the English law. That is also the Indian law. The substance of the English law has been enacted in Section 46, Partnership Act. Section 46 is as follows :

'On the dissolution of a firm every partner. or his representative is entitled, as against all the other partners. or their representatives, to have the property of the firm applied in payment of the debts & liabilities of the firm, & to have the surplus distributed among the partners. or their representatives according to their rights.'

This section is in substance Section 39 of the English Act, with verbal condensation. This section affirms the right of partners or their representatives to a share of the net assets of the firm after the firm is dissolved and the account is taken.

58. The right of a partner under this section is known as his general lien on the surplus of the assets of the firm and is commonly called partners' lien *In re Bourne*, (1906) 2 Ch. 427 : (75 L. J. Ch 779).

59. The principle of this section was stated in *Darby v. Darby*, (1856) 3 Drew. 495 at p. 503 : (25 L. J. Ch. 371) and by Lord Eldon in *Crawshay v. Collins*, (1808) 15 Ves. 218 : (10 R. R. 61) and by Sir William Grant in *Featherstonhaugh v. Fenwick*, (1810) 17 Ves. 298 : (11 R. R. 77). On the nature of the right given to a partner by this section, Pollock observes as follows (PP. 99, 100) :

'The right of each partner to control within certain limits the disposition of the partnership property is a rather peculiar one. It exists during the partnership, and when accounts are taken and the partners' shares ascertained from time to time, its existence is assumed, but it comes into full play only in the event of a dissolution. It belongs to a class of rights known as equitable liens, which have

nothing to do with possession, and must therefore be carefully distinguished from the possessory liens which are familiar in several heads of the Common law. The possessory lien of an unpaid vendor, factor, or the like, is a mere right to hold the goods of another man until he makes a certain payment; it does not, as a rule, carry with it the right of dealing with the goods in any way. Equitable lien, on the other hand, is nothing else than the right to have a specific portion of property dealt with in a particular way for the satisfaction of specific claims.'

60. The Partnership Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and unless there is an agreement to the contrary, the share of each partner means

'his proportion, of the partnership assets after they have been all realised and converted into money and all the partnership debts and liabilities have been paid and discharged.' (See also *Ajudhia Pershad v. Sham Sunder*, I. L. R. (1947) Lah. 417 at pp. 438-488 : (A. I. R. (34) 1947 Lah. 13 F. B.).)

61. 'Partnership assets' mean everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such. The qualification 'as such' is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; e. g., if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners. Whether it does so or does not, depends upon the circumstances of each case. It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them. The true method of determining as between the partners themselves what belongs to the firm, & what not, is to ascertain what agreement has been come to upon the subject. *Lindlay on Partnership*, 9th Edn., pp. 409, 416.

62. It is quite clear, therefore, that unless there is an agreement between the partners that a particular property would be the separate property of a partner,

there cannot be an entrustment of it to the other partner or partners. In the absence of such an agreement, each partner is interested in the whole of the partnership assets and there cannot be an entrustment of 'a partner's property' as such by one partner to another, because there is no 'property' which can be entrusted.

63. In the case before us there is no evidence that there was an agreement by which the partnership assets were converted into separate property of the partners. Therefore there cannot be a breach of trust, because nothing was or could be entrusted.

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