

Man Mohan Das and ors. Vs. Mohendra Bhowal

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Court : Kolkata

Decided On : Feb-05-1948

Appellant : Man Mohan Das and ors.

Respondent : Mohendra Bhowal

Judgement :

Harries, C.J.

1. This is a petition praying that certain proceedings pending in the Court of a Magistrate of Dibrugarh be quashed. It appears that the petitioners and the opposite party were partners and it was suggested that the petitioners had converted to their own use the share of the profits to which the opposite party was entitled. It was also suggested that the petitioners had misappropriated or converted to their own use the books of the partnership. Eventually the petitioners were prosecuted for offences under Sections 406 and 424, Penal Code.

2. The petitioners have urged before us that they cannot be prosecuted under Section 406 or Section 424 because the parties are partners. All are joint owners of the partnership assets and each is only entitled to such part of the profits as an account would show is due to him. It is clear that one partner cannot sue another for his share of the profits. It has been held repeatedly that one partner if he desires to claim what he alleges is due to him from the other partners he must file partnership suit, claim a dissolution of partnership and an account and payment to him of what is found due on taking the account. The only sum due from one

partner to another is what is shown to be due to him after taking account of all the partnership transactions.

3. It was suggested in this case that this partnership had made a profit and that the opposite party's share was being withheld from him. Whether or not this partnership made a profit in that particular year could only be ascertained on taking an account and further it is only after taking such an account that it could be said that any sum whatsoever was due to the opposite party. It cannot possibly be a criminal offence to withhold payment in the circumstances.

4. It has been held by a Pull Bench of this Court in *The Queen v. Okhoy Koomar Shaw* ('74) 13 Beng. L.R. 307 (F.B), that a partner may be guilty of an offence under Section 406, Penal Code. The decision is a somewhat theoretical one because it was not held that upon certain facts an offence under Section 406, Penal Code had been established. This Full Bench decision was considered by a Bench of this Court in a fairly recent case in *Bhupendra Nath Singha v. Giridharilal Nagar* : AIR1933 Cal582 in which it was held that when a partner is proved in fact to have been entrusted with the partnership property or with dominion over it, and has dishonestly misappropriated it or converted it to his own use, he may be convicted of an offence under Section 405, Penal Code. The Bench added, however, that it is difficult to conceive how such a situation could arise. 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. Each partner is co-owner of the whole of the common stock, though he receives or pays a share only in profits and losses arising there from, and it is difficult to conceive how he can be entrusted with, or have dominion over his own property or how he can dishonestly misappropriate it or convert it to his own use.

5. The effect of this Bench decision is that the Full Bench decision can have no application unless the partner is proved in fact to have been entrusted with the partnership property or with dominion over it and had dishonestly misappropriated it. The Bench decision points out that a partner who receives money on behalf of the partnership does not receive it in a fiduciary capacity and a partner holding partnership property is not holding it in a fiduciary capacity. If a partner sought to

be made criminally liable is not holding the property in a fiduciary capacity there can be no doubt that he cannot be prosecuted under Section 406, Penal Code. In the present case all that is alleged is that the petitioners are withholding the opposite party's share of the profits. As I have said, the proper method of obtaining redress in such a case is to sue for dissolution and account, and if on taking such account any sum is found due to the opposite party he would obtain a decree for it. Until such proceedings have been taken it is quite impossible to say whether the opposite party is entitled to anything at all; and the criminal Court does not appear to me to be the Court to take a partnership account.

6. It was urged, however, that the case clearly fell within Section 424, Penal Code, as the petitioners had dishonestly or fraudulently concealed or removed property. It is urged that in that section it is immaterial whether the property was the property of the petitioners themselves or of any other persons. Partners who are joint owners of books are entitled to retain them and the opposite party in this case has no more right to the books than the persons who have them in their possession. All that the opposite party is entitled to is inspection of these books. There is nothing dishonest or fraudulent in the petitioners retaining these books. Quite clearly all the partners cannot have exclusive possession of these books at the same time, but clearly all are entitled to inspection. That really is the complaint of the opposite party in this case. If he brought a partnership suit, claimed dissolution and account he could obtain an order for production and inspection of these books. What he really is doing now is bringing a criminal prosecution as a threat. In my judgment the facts disclosed in this case cannot possibly support a prosecution under either Section 406 or Section 424, Penal Code; and that being so I would allow this petition and quash the proceedings pending before the learned Magistrate.

Blank, J.

7. I agree.