

Sobha Singh Vs. Jai Singh

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Court : Himachal Pradesh

Decided On : Dec-18-1953

Reported in : AIR1954HP46

Judge : Ramabhadran, J.C.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 341, 405, 409, 439 and 561A

Appeal No. : Criminal Revn. No. 53 of 1953

Appellant : Sobha Singh

Respondent : Jai Singh

Advocate for Def. : Hira Lal, Adv.

Advocate for Pet/Ap. : Indar Singh Karwal and; D.R. Chaudhary, Advs.; Dina Nath

Disposition : Petition dismissed

Judgement :

ORDER

Ramabhadran, J.C.

1. This is a revision petition against the order of the learned Sessions Judge of Mandi, whereby he refused to interfere with the trial under Section 409, I. P .C.,

pending against the petitioner in the Court of the Magistrate, First Class, Mandi. In this revision petition, I am requested to revise the order of the learned Sessions Judge and quash the criminal proceedings pending against the petitioner in the Magistrate's Court. During the hearing of this revision petition, an application, purporting to be under Sections 561A, 439 and 344, Cr. P. Code, was moved by the petitioner. Therein, I am requested, in the alternative, to stay the proceedings in the Magistrate's Court pending the decision of civil proceedings between the parties.

I have heard learned counsel for the parties as well as learned Government Advocate. Proceedings against the petitioner were started on a complaint filed by one Jai Singh, who alleged that the petitioner, who was his partner in a weaving factory, had misappropriated certain sums of money, which had been entrusted to him. No evidence has been so far recorded in the Magistrate's Court. The Magistrate has himself remarked that, without recording the complainant's evidence, he could not arrive at a finding if a prima facie case is made out against the petitioner or not.

2. Before the learned Sessions Judge and here, it was argued that the petitioner could not be prosecuted under Section 409, I. P. C., at the instance of a co-partner, as every partner in the concern has a share in all the assets of the partnership. Counsel further pointed out that the partnership was created in 2003 B., corresponding to 1946 A. D. The weaving factory stopped work the following year and the present complaint was filed in 1952. It is further pointed out that no report was ever lodged to the police.

3. In support of his contention, learned counsel cited--'Rahaman v. R.D. Khambatta', AIR 1949 Cal 89 (A), where a Division Bench of the Calcutta High Court observed :

'The gist of the complaint by a partner against another partner was that the complainant had provided funds, that timber had been bought and sold and that the complainant demanded the money from the accused who put off the complainant on some pretext and then made himself scarce.

That the question between the parties was one of accounting and that until it took place, it could not be said how much one owed to the other. In the absence of a prima facie case of criminal misappropriation of such an unequivocal nature that it could have taken place between persons describing themselves in their agreement as partners, the criminal case could not be allowed to proceed.'

The latter portion of this ruling in a way helps the respondent because in the present case the complainant's allegation is that, although the petitioner was empowered to withdraw from the bank only Rs. 100/- at a time, he actually withdrew sums in excess, of this sum without consulting the other partners. On 5-2-1948, he withdrew a lump sum of Rs. 3,000/- without the consent of other partners. Therefore, in my view; this ruling does not help the petitioner.

4. Reliance was then placed on 'Jaikrishna v. Crown', AIR 1950 Nag 99 (B), where it was held that :

'A partner cannot be guilty of criminal breach of trust or misappropriation. 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.'

Learned counsel for the respondent cited 'Bhuban Mohan v. Surendra Mohan', AIR 1951 Cal 69 (PB) (C), where, following--'Satyanarayanamurthy v. Manikyala Rao', AIR 1940 Mad 265 (D) and--'Emperor v. Jagannath Raghunathdas', AIR 1932 Bom 57 (E) and, differing from earlier rulings, the Calcutta High Court held that :

'Whether or not a partner 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 partners then it could be said that a partner was entrusted with property or with dominion over it. For example, if by the terms of the partnership agreement one partner 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 necessary 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, and if entrustment was possible then a breach of conditions or arrangement might render the person accused guilty of fraudulent breach of trust.'

In AIR 1932 Bom 57 (E), referred to above, it was held by the Division Bench of that High Court that :

'Section 406 applies to a case of partner dealing with partnership property. Where therefore one partner is given authority by the other partners to collect money or property of the firm, he is entrusted with domain over that property, and if he dishonestly misappropriates it he comes within Section 406.'

This appears to be on all fours with the facts of the present case. In AIR 1940 Mad 265 (D), following AIR 1932 Bom 57 (E), a single Judge of that High Court held :

'The provisions of Section 405 apply to the case of partners and the view of law that a partner cannot be convicted of criminal breach of trust under any circumstances is erroneous.'

Counsel for the respondent also cited 'Bhudhar Mal v. Ramchander', AIR 1920 Pat 112 (P); where it was held by that High Court :

'Where the necessary ingredients justifying a prosecution are present, the law imposes no bar to the prosecution by a partner of his copartner of the offence of criminal misappropriation or of criminal breach of trust.'

He also cited 'Nanalal Amerchand v. Public Prosecutor', AIR 1951 Kutch 66 (G), where it was observed as follows :

'The partners who are collectively called the firm are agents of the whole firm. When, therefore, property is received by a partner it is received by him on his own behalf and as agent of the firm. The property is received by the partner personally and it does not matter that he received it as agent of the firm also.'

Where the contract provided that the party would be liable civilly for acts of misfeasance or malfeasance of his agents and servants including misappropriation of the goods received by the party by other partners of the firm of which the party was one of the partners.

Held, that the contract merely laid down the ordinary rule that the party would be liable for the acts of his agents and partners, who may not have signed the agreement. It could not exonerate the party from criminal liability if he happened to incur it.'

5. Coming to the facts of the present case, the allegations against the petitioner are that in his capacity as partner he withdrew and misappropriated sums of money. Having regard to the judicial authorities quoted above, I am unable to hold that the complaint against the petitioner, was barred.

In--'Dains Ram v. State', AIR 1951 Him P 56 (H), my learned predecessor observed that

'this Court would not interfere in revision, unless it was shown that the accused person is being harassed by illegal prosecution, or there is some manifest and patent injustice apparent on the face of the proceedings, or where the evidence on the record does not justify a charge of any offence, or where the trial, on the face of it, is an abuse of the process of the Court.'

In the present case, no evidence has yet been recorded against the petitioner. The prosecution, for reasons stated above, cannot be said to be illegal. There seems to be no manifest and patent injustice apparent on the face of the proceedings. Unless the evidence of the complainant is recorded, it is not possible to express any opinion whether the evidence on the record justifies the framing of a charge against the petitioner or not. Under these circumstances, I am of the opinion that the proceedings in the Magistrate's Court cannot be quashed.

6. That brings me to the alternative prayer, namely that pending the decision of proceedings under the Arbitration Act (in which, I understand, 28-12-1953 is fixed for evidence) the proceedings in the Magistrate's Court be stayed. Reliance was

placed on a ruling of the former Punjab Chief Court reported in--'Raghubir Singh v. Ram Chandar', 13 Ind Cas 927 (All (I)), where it was held that:

'Where a person, against whom criminal proceedings are started in respect of a matter, has instituted a civil suit without waste of time, the decision of which is likely to throw consir derable further light on the case, the criminal prosecution should be stayed pending the decision of the civil suit.'

Learned counsel for the petitioner also cited--'Faiz' Muhammad v. Abbas Jafferalli', AIR 1935 Sind 187 (J), where it was held by the former Judicial commissioner's Court of Sind that :

'The powers vested in the Magistrate by Section 344 are very wide. It is no doubt true that there is no hard and fast rule that a criminal case should be postponed pending the disposal of a suit which relates to the same subject-matter and each case must be decided on its own merits.

Where the disputes which are the subject-matter of the two cases are so intimately connected as to require the proceeding in the criminal case being postponed, to give precedence to the civil suit and the civil suit is not only prior in time but involves a decision on facts which must necessarily be proved in the criminal case before there can be a conviction and it will be more satisfactory if such issue is decided in the civil suit, the criminal case should be stayed till the disposal of the civil suit. Further it is also undesirable that there should be conflicting decisions of two Courts on this vital issue between the parties.'

Reliance was also placed on--'C. Sooraya v. Shwe Bwin', AIR 1920 Low Bur 47 (K), where the former Chief Court of Lower Burma held:

'The question whether criminal proceedings should be stayed pending the disposal of a civil suit is primarily a matter for the discretion of the Magistrate before whom they are pending; and the High Court will not lightly interfere with the exercise of this discretion.

Where the matter is purely a civil matter and can more fully and adequately be dealt with in a civil proceeding, criminal proceedings ought to be stayed pending

the decision of the civil suit.'

The underlying principle of these rulings is that no hard and fast rule can be laid down and each case has to be decided on its own merits.

7. Learned counsel for the respondent cited the following rulings (a);--'Taj-Ud-din v. Taj Muhammad Nasir', AIR 1921 Lah 386 (L), where after observing that there was no statutory provision making it compulsory to stay criminal proceedings, it was held that:

'Where the questions are different though allied to each other and arising out of the same transaction, the criminal proceedings need not be stayed pending any civil proceedings that may have been instituted.'

(b)--'Gnanasingamani Nadar v. Vedamuthu Nadar', AIR 1927 Mad 308 (M), where it was held:

'If the law allows a legal process, it should not be condemned as unjust. Where an accused chooses to file a civil suit during the pendency of the criminal action against him, he should not be denied that right. His action only becomes questionable when he tries by virtue of the suit to set up other rights to which he is not entitled.

The High Court in the exercise of its function of superintendence should avoid staying proceedings in a criminal case except on special grounds merely because the same question is in issue in a civil suit.'

(c)--'C. Ramiah v. N. Ramiah', AIR 1927 Mad 778 (N),

'Applications for staying of criminal proceedings during the pendency of a civil suit are sometimes argued as if there were an invariable rule that when the same issue is agitated both in the civil and criminal side, the civil shall take precedence of the criminal Court. This is not so. Each case must be considered on its own merits and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the cases on its file with the utmost expedition.

It must be assumed that in either Court justice will be done and which Court precedes the other is merely a question of convenience.

High Court will not ordinarily interfere, if the Court refusing to act under Section 344, Criminal P. C., has exercised a judicial discretion.'

(d)--'Gopal Chandra v. Suresh Chandra', AIR 1929 Cal 563 (O), where it was held:

'An accused applied for stay of criminal proceedings pending decision in a civil suit on substantially the same issues and between substantially the same parties.

Held that in the case of a crown prosecution with the Crown a party, whose interest and rights are not those of a private prosecutor, but of public justice, proceedings in a criminal Court could not be stayed pending decision in the civil suit.'

(e)--'Bhagwat Prasad v. Ramkisan Ram Sonar', AIR 1930 Pat 351 (P), where it was held that :

'An order staying criminal proceedings pending decision in civil suit, is in essence only justifiable on special grounds, the general rule being that High Court should avoid staying proceedings in lower Courts, particularly when the civil suit is instituted after the commencement of the criminal case with the object of postponing the criminal trials,'

and (f)--'Pannalal v. Emperor', AIR 1943 All 14 (Q),

'The accused instituted a civil suit to recover Rs. 126/- on the allegation that the complainant had pledged with him certain ornament and had in spite of notices failed to redeem the same in consequence of which the accused had to sell the ornament for what, it was worth which was less by a sum of Rs. 126/- than the amount due to the accused from the complainant. Five months later, the complainant filed a criminal complaint alleging that the accused had misappropriated the ornament and pretended to sell it for much less than what it was really worth. The accused was charged under Sections 420 and 406, Penal Code. Some time later the complainant filed a civil suit on the same allegation.

Held that the criminal Court would not be bound by the decisions of the civil Court as the criminal case was one between the Crown representing the interests of the general public to prevent dishonesty and insecurity on the one side and the accused on the other. If it were held that criminal Courts in the circumstances should be bound or should even be affected by decision of civil Courts it would lay open a way to a complainant to compound offences with which the accused was charged by allowing a collusive civil decree to be passed against him. There was therefore no reason why the criminal proceedings should be stayed because they were to all intents and purposes independent of the decisions in the civil suit which would be decisions between the complainant and the accused and not decisions between the Crown and the accused.'

8. Learned counsel for the respondent pointed out that the case under the Arbitration Act was one for rendition of accounts and dissolution of partnership. He argues and, in my opinion, rightly, that there is no justification for staying the proceedings on the criminal complaint pending the decision of the civil case. Having regard to the consensus of judicial authorities quoted above, I find no case is made out for staying the criminal proceedings. It would not be out of place to point out that the conduct of the petitioner, all other circumstances apart, has not been such as to entitle him to such a stay.

It was pointed out that the petitioner had absconded when the complaint was filed; that proceedings under Sections 87 and 88, Cr. P. C., had to be taken up against him; that he evaded appearing in the Court of the Magistrate and that he took the course of appearing before my learned predecessor at Simla with an application praying that the case against him be transferred to some other district. That petition was rejected by my learned predecessor with the remark that he could not accede to the view that the petitioner would not get a fair trial at Mandi. The complaint was filed in 1952. The Magistrate's order rejecting the petitioner's request was passed on 11-2-1953.

Petitioner then went up in revision to the Sessions Judge, who rejected his petition on 22-8-1953. He then came up to this Court by way of revision and that has taken another four months approximately. So far, the complainant has had no

opportunity of adducing his evidence before the Magistrate. Under these circumstances, I am of the opinion that no case is made out either for quashing the proceedings in the Magistrate's Court, or of staying them pending the decision of the civil case between the parties. I reject the revision petition and direct that the trial should proceed without further delay. The petition under Section 561A, Cr. P. C., is also rejected. Stay vacated.

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