Krishan Kumar Vs. Devinder Mohan Sharma and anr.

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SooperKanoon Citation : sooperkanoon.com/898604

Court : Jammu and Kashmir

Decided On : Feb-27-2006

Reported in : 2006CriLJ3571,2006(2)JKJ517

Judge : J.P. Singh, J.

Acts : Evidence Act - Section 27; ;Ranbir Penal Code (IPC), 1989 (Smvt.) - Sections 406 and 467; ;Jammu and Kashmir Code of Criminal Procedure (CrPC) , 1989 (Smvt.) - Sections 173 and 205D

Appeal No. : Cri. Revn. No. 36 of 2001

Appellant : Krishan Kumar

Respondent : Devinder Mohan Sharma and anr.

Advocate for Def. : S.A. Salaria, Sr. Counsel, a/w.,; Raj Kamal Gupta, Adv.

Advocate for Pet/Ap. : P.N. Raina, Adv.

Judgement :
ORDER

J.P. Singh, J.

1. Learned Additional Sessions Judge, Ramban, has set aside orders passed by Judicial Magistrate First Class, Batote, holding that the Magistrate did not have

jurisdiction to discharge the accused, when the challan against the accused Included an offence, i.e. Section 467 of the Ranbir Penal Code, exclusively triable by the Court of Sessions, and that the case was required to be committed to the Court of Sessions.

2. Krishan Kumar, accused, is aggrieved of the order of learned Sessions Judge, Ramban. He has come up to this Court invoking its Criminal Revisional Jurisdiction.

3. Vide order dated May 30, 2001 learned Magistrate had held that though one of the offences appearing in the police challan, i.e. offence under Section 467, RPC was exclusively triable by the Court of Sessions, yet the case did not warrant committal because addition of Section 467, RPC in report under Section 173 of the Code of Criminal Procedure, appeared to be an error, as there were no allegations in the police challan showing infraction of Section 467, RPC. He, thereafter, proceeded to consider the case for finding out as to whether or not any offence was made out against the petitioner accused, who later was discharged by the learned Magistrate,

4. Sh. P. N. Raina, learned Counsel for the petitioner, submits that petitioner was a partner of the firm and in the absence of any special agreement in the partnership deed, he could not be held liable for the commission of offence under Section 406, RPC.

5. Learned Counsel further submits that Section 205D of the Code of Criminal Procedure, does not contemplate mechanical committal to the Court of Sessions for it would render the Magistrate a mere post-office.

6. Sh. P. N. Raina, refers to 'Velji Raghavji Patel v. The State of Maharashtra' : 1965 CriLJ431 and 'Hardev Singh v. Karam Das Khan' AIR 1959 Jammu and Kashmir 19 : 1959 Cri LJ 322.

7. Sh. S. A. Salaria, learned senior counsel for the respondents, on the other hand, submits that learned Magistrate has no jurisdictional competence to comment as to whether or not 467, RPC was attracted in the case and all that the

Magistrate was required to do was to commit the case to the Court of Sessions, once the challan contained an offence which was exclusively triable by the Court of Sessions.

8. Shri. S. A. Salaria submits that the petitioner did not have the authority to usurp the partnership property and convert it to his own use by operating a Bank Account in firm's name and showing it to be his sole proprietorship concern.

9. I have considered the submissions of the learned Counsel for the parties.

10. Allegations reflected in the challan do not indicate any allegation of commission of forgery by the accused. All that is claimed in the FIR is that Krishan Kumar petitioner, a partner of M/s. K.V. Traders, Batote, had in conspiracy with the Bank official of the Jammu Central Co-operative Bank, Batote, managed opening of an account in the name of M/s. K. V. Traders, Batote, by showing it to be the sole proprietorship concern, so as to facilitate the entry of an amount of Rs. 2,62,952/- (Rupees two lakh sixty two thousand nine hundred fifty two) in this account which amount had been obtained by him from those who owed it to the firm and thereby misappropriated the property of the firm.

11. Absence of any allegation of forgery against the accused in the FIR or police challan has not been controverted by the parties. Addition of Section 467, RPC in the report under Section 173 of the Code of Criminal Procedure is, thus admittedly, an error.

12. In such a situation, when there is no allegation in the police challan as to the commission of any such offence by an accused, which may be exclusively triable by the Court of Sessions, is it still imperative for the learned Magistrate to commit the case to the Court of Sessions ?

13. In my view, the Magistrate has not to blink at the omission and commit the case to the Court of Sessions. The expression 'it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions', vests jurisdiction in the Magistrate to find out as to whether or not there exist allegation/s of the commission of an offence exclusively triable by the Court of Sessions. This

function can be discharged by the Magistrate only if the allegations against the accused are 'perused' by him. Needless to mention that the perusal of the allegations would not vest any jurisdiction in the Magistrate to go into the merits of the allegations for finding out as to whether or not an offence was made out, Which jurisdiction, undoubtedly vests in the Court of Sessions. Inadvertent or for that matter unnecessary addition of an offence exclusively triable by the Court of Sessions, sans allegations supporting such allegation would not, in my view, require a Magistrate to commit the case to the Court of Sessions.

14. Learned Magistrate was, thus, right in refusing to commit the case to the Court of Sessions.

15. This takes me to the next submission of the learned Counsel for the petitioner to consider whether the discharge in favour of the petitioner accused is justified in view of the judgments cited by the learned Counsel.

16. In order to consider these submissions of learned Counsel for the petitioner, reference may be necessary to the partnership deed which has been relied upon by the prosecution and forms part of the records. First paragraph and Clauses 9, 10 and 13 of the partnership deed may be relevant to deal with the submission of learned Counsel. These clauses read thus:

9. All the property of whatever kind belonging to the firm shall vest ultimately in the parties of the first and second parts and the party of the third part will have no right, title or interest in it.

10. All the money received by the firm in the course of business whether by cash, cheque or draft etc. shall first be deposited in the bank mutually agreed upon by the partners which shall be operated under the individual signatures of any of the parties.

13. Every partner shall have the right to withdraw a sum not exceeding Rs. 1000/- per month from the profits of the firm and such money shall be debited to the capital account of the respective partner. In case any partner desires to draw more, he shall have to obtain prior written consent of the other partners.

17. In view of the extracted clauses of the partnership deed, it can be safely concluded though prima-facie that the petitioner partner could not withdraw any amount from the partnership firm exceeding Rupees one thousand per month and was required to deposit all that was collected by him for and on behalf of the firm in the Bank mutual account opened by the partners. The clauses referred in the partnership deed disclose a special agreement of the parties, besides, that the petitioner did not have any right over the property of the partnership which right stood vested exclusively in the partners other than the petitioner.

18. The judgments cited, by learned Counsel for the petitioner, thus, advance the case projected by the petitioner that there was no special agreement which did not permit the petitioner to utilize the property of the firm, which belonged to all the partners of the firm.

19. Learned Magistrate thought cited law for and against the proposition as to whether or not a partner would be guilty of offence under Section 406, RPC but had omitted to record his finding on this issue. He on the other hand proceeded to appreciate prosecution evidence invoking Section 27 of the Evidence Act, but failed in his duty to provide opportunity to the prosecution to substantiate its case by leading all such evidence, which it had assembled during the investigation of the case.

20. Learned Magistrate, in my opinion, has for exceeded his jurisdiction in appreciating only part of the evidence of the prosecution and that, too, in a slip shod manner. There is no material on records to support the finding of the learned Magistrate that there were no grounds for proceeding against the accused.

21. On the contrary, it has been specifically stated in the complaint that a Company ITC/Ltd., owed a sum of Rs. 2,62,952/ - (Rupees two lakh sixty two thousand nine hundred fifty two) to the partnership firm and vide DD 138690, dated September 3, 1993, payable at Batote, the said company made the payment to the firm through petitioner Krishan Kumar, partner, who with criminal intention opened a Saving Account Mo. 1363, on his name on 22-11-1993 with the Jammu Central Co-operative Bank, Batote, with a deposit of Rs. 100/- and on the same day opened Current Account No. 119, on the name of the said firm M/s. K.V.

Traders. Batote. He gave an undertaking on a stamped paper falsely showing himself as a sole proprietor of the said firm, namely M/s. K. V. Traders.. The concerned Bank official of the Jammu Central Co-operative Bank, Batote, connived with the said Krishan Kumar, in managing the collection of the amount covered by the Demand Draft on the same day in the said Current Account No. 119 and its transfer on the same day. Five Bank Drafts amounting in total to Rs. 2,62,952/- (Rupees two lakh sixty two thousand nine hundred fifty two) were made from out of the property of the partnership firm thereby misappropriating partnership property, which was entrusted to Krishan Kumar by the Company for crediting it to the partnership firm, to discharge the company of its liability to the firm. It is further alleged that Krishan Kumar with mala fide intentions fraudulently gave an undertaking before the Bank that he is the sole proprietor of the firm. It is stated that with the connivance of the Bank official, the firm was cheated by the petitioner, who dishonestly misappropriated the funds of the partnership firm.

22. In view of the aforementioned allegations in the FIR and material available on records in support thereof, the finding of the learned Magistrate that there are no grounds for proceeding against the petitioner, cannot be justified.

23. In view of the above discussion, while upholding order dated October 19, 1994 of learned Judicial Magistrate First Class, Batote, I set aside both the orders, i.e., order dated November 30, 1994 of learned Judicial Magistrate First Class, Batote, discharging the petitioner accused and order dated February 28, 2001 of Additional Sessions Judge, Ramban, directing committal of the case to the Court of Sessions.

24. This revision petition is, accordingly, disposed of.

25. The Police challan shall be taken up by the learned Judicial Magistrate First Class, Barote, for further proceedings in accordance with law to be concluded expeditiously.