

Surender Kumar Jain Vs. State and anr

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Court : Delhi

Decided On : Jan-30-2012

Appellant : Surender Kumar Jain

Respondent : State and anr

Advocate for Def. : Ms. Fizani Hussain, Mr. K.K. Aggarwal, Mr. H.J.S. Ahluwalia

Advocate for Pet/Ap. : Mr. Ashok Bhasin, Mr. Uday Gupta, Mr. S.B. Sharma, Mr. M.K. Tripathi

Judgement :

* THE HIGH COURT OF DELHI AT NEW DELHI + CRL.M.C. 299/2008 Reserved on: 18.01.2012 Pronounced on: 30.01.2012 SURENDER KUMAR JAIN Petitioner Through: Mr. Ashok Bhasin, Senior Advocate with Mr. Uday Gupta, Mr. S.B. Sharma, Mr. M.K. Tripathi, Mr.Sunklan Porwal and Ms.Anuradha, Advocates versus STATE and ANR Respondent Through: Ms. Fizani Hussain, APP with ASI Ram Phal, P.S. Lahori Gate Mr. K.K. Aggarwal and Mr. H.J.S. Ahluwalia, Advocate for R-2 CORAM: HON'BLE MR. JUSTICE M.L. MEHTA M.L. MEHTA, J..

1. The present petition is preferred under section 482 Cr.P.C. r/w Article 227 of the Constitution assailing the order of the Ld. ASJ dated 19.09.2007 upholding the decision of the Ld. MM dated 12.05.2006 vide which the charge under section 406 IPC was ordered to be framed..

2. The brief facts necessitating the present petition are that the complainant on 30.10.1998 lodged a complaint at police station, Lahori Gate alleging that a file of the complainant containing Sales Tax Forms has been misappropriated by the petitioner. On enquiry a report was given by the ACP concerned that no case is made out. The complainant/respondent No.

2. filed a criminal writ before this court against the police officials which was disposed of with direction to the DCP, North, to look into the complaint and proceed in CrI.M.C. 299/2008 *Page 1 of 8* accordance with law. In pursuance of the direction of this court the ACP conducted an enquiry and submitted a report concluding that an offence under section 406/420 IPC is prima facie made out. On the basis of this report the DPC directed P.S. Lahori Gate to register an FIR whereupon FIR No. 492/1999 under section 406/420 IPC was registered against the petitioner. After investigation, a charge-sheet was filed under section 406 IPC and the trial court took cognizance under section 406 IPC vide its order dated 16.02.2002. The petitioner filed a criminal writ in this court for quashing of the FIR and the same was disposed of vide order dated 21.03.2003 wherein liberty was granted to the petitioner to raise all the contentions before the trial court as the charge- sheet had already been filed in the case. The trial court framed charges against the petitioner under section 406 IPC vide its order dated 12.05.2006. This order was challenged in the court of Ld. ASJ under section 397 Cr.P.C. wherein the order of the Ld. MM framing charge against the petitioner was upheld vide impugned order dated 19.09.2007..

3. At the outset, learned counsel for respondent No. 2/complainant objected to the maintainability of the petition submitting that though the petition was preferred under section 482 Cr.P.C. read with under Article 227 of the Constitution, but the petition, in fact, was a second revision against the order of MM framing charges under section 406 IPC. He submitted that the second revision being barred under section 397(3) Cr. P.C. was not maintainable in this Court..

4. There was, in fact, no dispute with regard to the proposition that there was statutory bar contained in section 397(3) Cr.P.C. for the second revision petition. The power of this Court and that of the Court of Sessions, so far as a revision is

concerned, are concurrent. The intention of the Legislature under section 397(3) Cr.P.C. is definite and the scheme therein is unambiguous and CrI.M.C. 299/2008 *Page 2 of 8* clear. Sub section (3) does not permit the repetition in exercise of jurisdiction of revision under section 397(1) Cr.P.C. It curtails the chance availing second remedy and therefore, an unsuccessful revisionist in the court of Sessions cannot be entertained for the second time by the High Court. In fact, sub section (3) intends and aims to secure finality. The choice lies with the revisionist either to file revision directly in this Court or in the Sessions Court. Having availed the remedy by filing revision before the Sessions Court, one cannot be permitted to avail second chance to file revision in view of the bar of sub section (3) of section 397 Cr.P.C..

5. The issue regarding filing of petition before the High Court after having availed first revision petition before the Court of Sessions has come up before the Supreme Court and this Court repeatedly. While laying that section 397(3) Cr.P.C. laid statutory bar of second revision petition, the courts have held that High Court did enjoy inherent power under section 482 Cr.P.C. as well to entertain petitions even in those cases. But, that power was to be exercised sparingly and with great caution, particularly, when the person approaching the High Court has already availed remedy of first revision in the Sessions Court. This was not that in every case the person aggrieved of the order of the first revision court would have the right to be heard by the High Court to assail the same order which was the subject matter of the revision before Sessions Court. It was all to depend not only on the facts and circumstances of each case, but as to whether the impugned order bring about a situation which is an abuse of process of court or there was serious miscarriage of justice or the mandatory provisions of law were not complied with. The power could also be exercised by this Court if there was an apparent mistake committed by the revisional court. Reference in this regard can be made to the judgments of the Supreme Court in *Madhu Limaye Vs. State of Maharashtra* (1977) 4 SCC 551, *State CrI.M.C. 299/2008 Page 3 of 8* of *Orissa Vs. Ram Chander Aggarwal*, AIR SC 87, *Raj Kapoor Vs. State (Delhi Administration)* 1980 Cri.L.J. 202, *Krishnan and Anr. Vs. Krishnaveni and Anr* and *Kailash Verma Vs. Punjab State Civil Supplies Corporation and Anr* (2005) 2 SCC.

571. 6. Now having seen the dictum of law that the second revision petition was ordinarily not to be entertained by this court and it was only in those cases which would come within the parameters of invoking inherent jurisdiction under section 482 Cr.P.C. and under Article 227 of the Constitution of India, that such a petition could be entertained, I may proceed to see as to whether the instant petition, fall within that category of cases which require invoking of inherent jurisdiction of this Court under these provisions..

7. The submissions of learned counsel for the petitioner was twofold (i) that there was limitation of three years under section 468(2) (c) Cr. P.C. for taking cognizance of an offence under section 406 IPC (ii) that there was no prima facie, case made out under section 406 IPC inasmuch as the ingredient of 'entrustment' was lacking in the complaint. In other words, the submission was that since there was no entrustment of the file containing Sales Tax Forms by the respondent to the petitioner, no offence under section 406 IPC was made out against the petitioner. In this regard reliance was placed on the cases of Suneet Gupta Vs. Anil Triloknath Sharma and others (2008) 11 SCC 670, SW. Palanitkar and Ors. Vs. State of Bihar and V.P. Shrivastava Vs. Indian Explosives Limited and Ors (2010) 10 SCC.

361. 8. With regard to the contention of limitation of the petitioner, it is undisputed that in the case of section 406 IPC, the period of limitation was three years. The question, however, would be as to when this period is to be reckoned. In this case the offence was alleged to be committed in around 1996. The cognizance came to be taken by the Magistrate on 16th February 2002. If *CrI.M.C. 299/2008 Page 4 of 8* the date of cognizance was to be taken as the date for the purpose of computing limitation, one could agree that the cognizance was apparently time barred. The essential ingredient of the offence of criminal breach of trust is not the demand, but the refusal to accede to that demand. So long as there is no refusal on the part of the accused there does not arise the question of breach of trust. Here, the allegations against the petitioner are that he had come to the shop of the complainant and asked him to show the Sales Tax Forms. When the file was shown to him, he informed that there was difference in the accounts pertaining to the business and he desired to take the file containing those forms. Thereupon,

referring to the business dealings and good relations which they had, the petitioner took away the file with the promise to return the same as and when the differences in the accounts were settled. Thereafter, the complainant continued requesting him to return the file, but the petitioner did not return the file on one pretext or the other. Instead of returning the file, he rather started blackmailing the complainant. The complaint was made against the petitioner in October 1998 to the police. From the averments in the complaint, as briefly noted above, it is seen that the petitioner had refused to return the file which was taken by him in good faith due to ongoing business relations with the complainant and also on the assurance to return the same after sorting out the difference in the account..

9. For the purpose of computing limitation, it is the date of the complaint that is material and not the date on which the cognizance come to be taken by the Magistrate and the process was issued against the petitioner. The subsequent stages such as examination of complainant and the witnesses, the consideration of the case, the preliminary inquiry etc. take considerable time and it would therefore, be unreasonable and irrational to compute the period of limitation from the date when the cognizance was taken or the process was CrI.M.C. 299/2008 *Page 5 of 8* issued. Furthermore, these processes are dependent on various factors including the time available to the court which is something over which the complainant has no control. It would, thus, be wholly untenable to hold that a complaint if presented within the period of limitation would be barred merely because a certain amount of time elapsed until the cognizance could be taken or the order of process could be passed. Since the complainant continued requesting the petitioner to return the file and it was not returned for two years, the complainant was compelled to file a complaint with the police on 30th October 1998. I do not find any merit in the submission that the complaint was time barred..

10. With regard to the submission that there was no case made out under section 406 IPC, it may, at the outset, be borne in mind that section 405 IPC which defines criminal breach of trust does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of relationship whereby the owner of the property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the

happening of a certain event. There would be creation of entrustment if one is entrusted with property 'in any manner' or 'with any dominion over the property'. Entrustment of the property creates a trust which is only an obligation increased with the ownership of the property and arise out of confidence reposed and accepted by the owner..

11. From the facts briefly noted above, it would be seen that ingredient of entrustment was fulfilled as the file in question was taken by the petitioner in good faith from the respondent for the purpose of reconciling the accounts and the same was never returned despite repeatedly asking by the complainant. The cases of Suneet Gupta (Supra), SW. Palanitkar and Ors. (supra) and V.P. Shrivastava (supra) which were relied upon by the petitioner are entirely Crl.M.C. 299/2008 *Page 6 of 8* distinguishable from the facts of the present case. It would all depend on the facts and circumstance of each case to see as to whether there was entrustment or not and since the element of entrustment in the cited cases was lacking, the courts rightly held that the offences under section 406 IPC were not made out..

12. In the case of State of Bihar Vs. Ramesh Singh AIR 1977 SC 2018 it was held as under: "at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and Judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence Crl.M.C. 299/2008 *Page 7*

of 8 then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.".

13. In view of my above discussion and having seen that the present case was at the stage of framing of charges and that both the courts below have appreciated the allegations against the petitioner and have formed a prima facie view of the framing of charges under section 406 IPC. In view of entrustment and refusal to return the file, I do not find any infirmity or illegality in the impugned order. Not only that, the case does not fall within the parameters of invoking inherent and extraordinary jurisdiction under section 482 Cr.P.C. or under Article 227 of the Constitution of India, even otherwise it does not call for any interference by this court on merits. Hence, the petition is hereby dismissed. Nothing in this order shall amount to expression of opinion on the merits of case. M.L. MEHTA, J. JANUARY 30, 2012 awanish Crl.M.C. 299/2008 Page 8 of 8

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