

CASE NO.:
Appeal (crl.) 317 of 2008

PETITIONER:
S.K. Alagh

RESPONDENT:
State of U.P. & Ors

DATE OF JUDGMENT: 15/02/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 317 OF 2008
(Arising out of SLP (Crl) No.4661 of 2007)

S.B. Sinha, J.

1. Leave granted.
2. M/s. Akash Traders was an Area Wholesale dealer of Britannia Industries Limited (the Company) for Azamgarh, U.P. Dealership of Respondent No.2 was terminated by the said company. It was earlier informed that goods will be delivered only upon receipt of demand drafts issued by it. Complainant sent two demand drafts for a sum of Rs.18,000/- and Rs.1,50,000/- for supply of goods on 14.9.2000 despite the fact that the dealership had been terminated earlier.
3. The said demand drafts were sent to the appellant through the local Sales In-charge of the Company. It is stated that the complainant refused to take the same back.
4. A new Area Wholesaler for Azamgarh was appointed by the company.
5. A demand was made by the complainant to deliver goods by a letter dated 24.9.2000 stating that the company owes him a sum of Rs.1,00,000/-. The stand of the company that his dealership had been terminated was reiterated by a letter dated 25.9.2000.
6. Ashok Kumar Aggarwal, purported to be the proprietor of the firm M/s. Akash Traders, filed a complaint petition in the court of Chief Judicial Magistrate, Azamgarh against the appellant herein for commission of an offence under Section 406 of the Indian Penal Code. Britannia Industries Ltd. was not impleaded as an accused therein.
7. On or about 17.2.2001, i.e., after filing of the complaint petition, the dealer accepted the said demand drafts being dated 8.1.2002 for a sum of Rs.1,68,000/-. On or about 25.2.2001, Ashok Kumar Aggarwal, the original complainant expired. A substitution application was filed by the second respondent-Alok Kumar Aggarwal on or about 19.4.2001.
8. Inter alia, relying on or on the basis of the allegations made in the complaint petition that 'the company with mala fide intention neither sent the goods, nor returned the money'; an order for summoning the appellants was passed on 8.5.2001. A publication to that effect was also made in an article in a local newspaper.
9. An application for recalling the order summoning before the learned Chief Judicial Magistrate was filed by the appellant. The learned Chief Judicial Magistrate, by an order dated 13.12.2001 discharged the accused in terms of Section 245(2) of the Code of Criminal Procedure, holding :
"From the perusal of the record, this fact has come to light that in between the complainant M/s. Akash Traders, Azamgarh and Britannia Industries Ltd., Kolkata an agreement was made. M/s. Akash Traders were the authorized agent of Britannia

Industries Ltd. and according to terms and conditions of the Agreement, Britannia Industries Ltd. used to supply biscuit to M/s. Akash Traders, Azamgarh. On 8.9.2000, Britannia Industries Ltd. terminated the agency regarding agreement as a result of which in between the parties dispute arose. It is the submission of the complainant that on 13.9.2001 bank draft of Rs.1,68,000/- was sent in favour of Britannia Industries Ltd. but on behalf of the accused the above amount did not return till 7.2.2001 to the complainant. The pleading on behalf of the accused is that the bank draft of Rs.1,68,000/- was returned to M/s. Akash Traders on 8.1.2001 and its payment was received by the complainant on 19.2.2001 under protest. Both the parties regarding the above reference after the case being decided this legal position has been made clear that if in any matter civil or criminal case is made out then on the basis of obtaining civil relief the proceedings of the suit could not be terminated. In the present matter, it has to be decided that whether in between both the parties during the business transactions prima facie criminal case was found? If in the present case any criminal case is not found then under Section 245(2) Cr.P.C. the accused could be released at any stage. After the termination of agreement in between the accused and the complainant regarding agency on 13.9.2001 bank draft for an amount of Rs.1,68,000/- was sent to Britannia Industries Ltd. for the supply of biscuits. Prior to this also agreement dated 8.9.2000 has already been terminated regarding the agency in favour of M/s. Akash Traders Azamgarh. The complainant for receiving back an amount of Rs.1,68,000/- sent letters dated 11.10.2000 and 21.10.2000 but till 7.2.2001, the complainant did not receive back the above amount of Rs.1,68,000/-. But from the perusal of the photo copy of the letter enclosed with the file of bank draft of State Bank of India, Keshavpuram, Delhi it has become clear that bank draft No.597805 dated 8.1.2001 for an amount of Rs.1,68,000/ had already been prepared in favour of M/s. Akash Traders, Azamgarh and after the departmental proceedings of clearance on 19.2.2001 the complainant had received back the amount on 19.2.2001. Thus, it is clear that the applicant/accused had transferred an amount of Rs.1,68,000/- on 8.1.2001 in favour of the complainant M/s. Akash Traders through Bank Draft, thus, in transaction whatever delay was made in returning back the amount of bank draft that has been committed due to proceedings relating to payment being done due to banking process and looking to the aforesaid facts it becomes clear that on the side of applicant/accused there was no intention of criminal misappropriation and, thus, there is no appropriate basis to initiate any action against the accused. Therefore, under Section 245(2) Cr.P.C. the proceedings of the case are terminated and the accused is released."

11. A revision application was filed thereagainst by the complainant which, by reason of an order dated 5.6.2002, was allowed, stating :

"It is clear from the perusal of the file that the learned Chief Judicial Magistrate in the impugned order dated 13.12.2001 has not granted any opportunity of adducing the evidences in detail under the provisions of Section 244 Cr.P.C. but by not granting any opportunity to adduce the evidences by the complainant under Section 244 Cr.P.C. has passed the impugned order under the provisions of Section 245(2) Cr.P.C. which is not legal and proper. Under the provisions of Section 244 Cr.P.C. the complainant must be granted opportunity of filing the evidences in detail as per the law. Under the above, provisions, the charges are framed against the accused persons after the evidences are taken on record otherwise not, that is to say, passing of order under Section 245 Cr.P.C. would be proper and justifiable."

12. An application filed by the appellant before the High Court in terms of Section 482 of the Code of Criminal Procedure was dismissed by the High Court by reason of the impugned judgment, stating :

"From the perusal of the allegations made against the applicants and from the perusal of the impugned order, it appears that prima facie offence is made out against the applicant and there is no procedural mistake in taking cognizance and summoning the applicants, therefore, the prayer for quashing the impugned orders dated 8.5.2001 passed by the learned Magistrate, Azamgarh and 5.6.2002 passed by the learned Additional Sessions Judge, Fast Track Court No.2, Azamgarh is refused.

The interim stay order dated 3.7.2002 is vacated.

Accordingly, this application is dismissed."

13. The short question which arises for consideration is as to whether the complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence as against the appellant under Section 406 of the Indian Penal Code.

14. Section 405 defines 'criminal breach of trust' to mean :

Section 405. \027Criminal breach of trust\027
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".

15. Appellant No.1 is the Managing Director of the Company. Respondent No.3 was its General Manager. Indisputably, the company is a juristic person. The demand drafts were issued in the name of the company. The company was not made an accused. The dealership agreement was by and between M/s. Akash Traders and the company.

16. Mr. Pramod Swarup, learned counsel appearing on behalf of Respondent No.2, in support of the order passed by the learned Chief Judicial Magistrate as also the High Court, submitted that as, prima facie, the appellant was in charge of and was in control of the business of the company, he would be deemed to be liable for the offence committed by the company.

17. Indian Penal Code, save and except some provisions specifically

providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.

18. A criminal breach of trust is an offence committed by a person to whom the property is entrusted.

19. Ingredients of the offence under Section 406 are :

"(1) a person should have been entrusted with property, or entrusted with dominion over property;

(2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;

(3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

20. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. {See Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhyia [(2006) 10 SCC 581]}.

21. We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. {See Maksud Saiyed v. State of Gujarat and Ors. [2007 (11) SCALE 318]}.

22. The High Court, therefore, committed a manifest error in passing the impugned judgment.

23. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. Respondent No.2 is liable to bear the costs of the appellant for causing harassment to him which is quantified at Rs.1,00,000/- (Rupees one lac only).