

Asoke Basak vs State Of Maharashtra & Ors on 8 October, 2010

Equivalent citations: AIRONLINE 2010 SC 326

Author: D.K. Jain

Bench: H.L. Dattu, D.K. Jain

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1980 OF 2010
(Arising out of S.L.P. (Crl.) No. 7338 of 2007)

ASOKE BASAK

-- APPELLANT (S)

VERSUS

STATE OF MAHARASHTRA & ORS.

-- RESPONDENT (S)

JUDGMENT

D.K. JAIN, J.:

Leave granted.

2. This appeal, by special leave, arises out of the judgment and order dated 9th October 2007, delivered by the High Court of Bombay in Criminal Application No. 2854 of 2004 in a petition filed by the appellant and one Mr. Krishna Rao, proforma respondent No.5 herein, under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code"). The High Court has, by the impugned judgment, declined to quash a criminal complaint filed by respondents No.2 to 4 in this appeal against the appellant and others for offences under Sections 405 and 409 read with Section 34 of the Indian Penal Code, 1860 (for short "the IPC").

3. Briefly stated, the facts, necessary for disposal of the present appeal, may be stated thus:

The appellant was the Chairman of the Maharashtra State Electricity Board (for short "MSEB"). Respondent No.2 - M/s Datar Switchgear Ltd. is a company which had entered into various contracts with MSEB for installation of Low Tension Load Management System. Respondents No.3 and 4 are the senior officials of respondent

No.2; respondent No.1 is the State of Maharashtra and the aforestated respondent No.5 is one of the co-

accused.

4. On 2nd March, 2001 respondent No.2 deposited an amount of ` 5 lakhs with MSEB as security deposit in lieu of bank guarantee to be used for tenders to be filed by respondent No.2 from time to time in the future. The conditions of tender and supply provided that:

"This security deposit in cash or in the form of bank guarantee or otherwise is for the due performance of the material/contract and the same shall be liable to apportion towards amount due or becoming due by the supplier on his failure to execute this order or any other contract and in the event of non fulfilment of the terms and conditions of the contract."

Certain disputes arose between MSEB and respondent No. 2. On 16th September 2003, respondent No. 2 informed MSEB that they were no longer interested in participating in any tenders which may be floated by MSEB and sought immediate refund of the said amount of ` 5 lakhs.

5. The Chief Engineer (Distribution), MSEB vide his letter dated 6th March 2004, informed respondent No.2 that the deposit of ` 5 lakhs had been adjusted by MSEB against the dues payable by respondent No.2 to MSEB.

6. On receipt of the said communication, on 29th June 2004, respondents No.2 to 4 filed Complaint No.1881 of 2004 before the Court of the Judicial Magistrate, First Class, Pune against the appellant and other senior officials of the MSEB under Sections 405 and 409 read with Section 34 of the IPC. The Judicial Magistrate, First Class, Pune took cognizance and issued summons against all the accused named in the complaint.

7. Being aggrieved by the order of the Magistrate taking cognizance of the complaint, appellant preferred the afore-stated petition under Section 482 of the Code before the High Court of Bombay for quashing of the complaint.

8. As stated above, the High Court, by the impugned judgment has dismissed the said petition. The High Court has inter alia⁸ observed that a prima facie case has been made out against the accused; the defence of the accused would be examined on merits at the time of trial; the availability of a civil remedy does not preclude a criminal law remedy and this alone cannot be a ground for quashing the complaint and it was not incumbent on the complainant to plead the role of each and every accused as due to the principle of vicarious liability under Section 34 of the IPC, if two or more than two persons intentionally do a thing jointly, it's the same if each of them had done it individually, since common intention presupposes prior concert. Hence, the present appeal.

9. Mr. Nagendra Rai, learned senior counsel appearing for the appellant assailed the decision of the High Court in not exercising its jurisdiction under Section 482 of the Code as fallacious on the

ground that the complaint, assuming to be correct in its entirety, does not disclose the commission of an offence under Section 409 IPC by the appellant. According to the learned counsel, the subject matter of the complaint is purely civil in nature and the complaint amounts to an abuse of the process of court. In support of his assertion that in this type of cases the courts should be loathe to take cognizance, in the brief written submissions filed on behalf of the appellant, reliance is placed on the decisions of this Court in *Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.*¹, *K.L.E. Society & Ors. Vs. Siddalingesh*², *Baijnath Jha Vs. Sita Ram & Anr.*³, *Suneet Gupta Vs. Anil Triloknath Sharma & Ors.*⁴ and *G. Sagar Suri & Anr. Vs. State of U.P. & Ors.*⁵. It was contended that the non-refund of `5 lakhs by MSEB could not amount to criminal breach of trust as under the terms of the contract, the MSEB could adjust the said amount against their claims, which were under various stages of adjudication.

10. Relying heavily on the decision of this Court in *S.K. Alagh Vs. State of Uttar Pradesh & Ors.*⁶, learned counsel contended that the summoning order issued by the Magistrate is ex-facie illegal and vexatious in as much as even as per the allegations in the complaint, the said amount was entrusted/bailed out to MSEB, which has not been made an accused and no role in this behalf has been assigned to the appellant. It was asserted that in the entire complaint there is not even a whisper that the adjustment in question was in furtherance of a pre-planned action by (2007) 12 SCC 1 (2008) 4 SCC 541 (2008) 8 SCC 77 (2008) 11 SCC 670 (2000) 2 SCC 636 (2008) 5 SCC 662 MSEB and its functionaries, including the appellant, so as to attract Section 34 IPC. It was thus, pleaded that the Magistrate in taking cognizance of the complaint had failed to take into consideration all these relevant factors and, therefore, the summoning order is liable to be set aside.

11. Per contra, Mr. Ranjit Kumar, learned senior counsel appearing for respondents No.2 to 4 urged that since the deposit was in the nature of an interest free security, solely for the purpose of ensuring that contracts would be duly entered into if the tenders were awarded by MSEB to the respondents, it was in the nature of an entrust. In support, reliance was placed on the decision of this Court in *Rai Bahadur Seth Jessa Ram Fatehchand Vs. Om Narain Tankha & Anr.*⁷, wherein it was held that the fact that the security deposit did not attract interest, would lead to the inference that the deposit was an entrustment. It was further contended that the entrustment with MSEB enjoins the role of a trustee on the natural persons who controlled the MSEB at the material time, and therefore in light of the decision of this Court in *Jaswantraai Manilal Akhaney Vs. State of Bombay*⁸, it was fallacious to contend that the accused did not have dominion over the subject deposit. It was also *AIR 1967 SC 1162 AIR 1956 SC 575* contended that the remedies under the criminal law and civil law are not mutually exclusive but co-extensive; they differ in their content, scope and consequence and, therefore, even when a civil remedy is available, a criminal prosecution is not barred.

12. Relying heavily on a three-Judge bench decision of this Court in *Suresh & Anr. Vs. State of U.P.*⁹, wherein it was held that no overt act is needed on the part of the accused to attract Section 34 IPC, if he shares the common intention with others in respect of the ultimate criminal act, learned counsel contended that in the instant case, the complaint clearly spells out the role of the appellant and, therefore, Section 34 IPC, which recognizes the principle of vicarious liability, is clearly attracted. Commending us to the decision of this Court in *Shiva Nath Prasad Vs. State of W.B. & Ors.*¹⁰, learned counsel submitted that in a case under Section 409, the question of entrustment has to be

examined on the strength of the evidence led by the complainant and, therefore, at this stage, it is pre-mature to return a finding on the applicability of the said provision or to hold that the case is of a civil nature. (2001) 3 SCC 673 (2006) 2 SCC 757

13. Learned counsel also argued that while taking cognizance of a criminal offence and issuing process against the accused, the court is not required to pass a reasoned order, as pleaded by learned counsel for the appellant. In support, reliance was placed on the decisions of this Court in *Kanti Bhadra Shah & Anr. Vs. State of W.B.*¹¹, *U.P. Pollution Control Board Vs. Mohan Meakins Ltd. & Ors.*¹² and *Dy. Chief Controller of Imports & Exports Vs. Roshanlal Agarwal & Ors.*¹³. Relying on the decisions of this Court in *Hareram Satpathy Vs. Tikaram Agarwala & Ors.*¹⁴ and *Nirmaljit Singh Hoon Vs. The State of West Bengal & Anr.*¹⁵, learned counsel for the respondents strenuously urged that at the stage of issuance of summons the Magistrate has to satisfy himself that there was sufficient material to merely proceed, and not to sustain a conviction. According to the learned counsel, there was sufficient material before the Magistrate on the basis whereof he took cognizance of the complaint. Learned counsel also invited our attention to the notice dated 22nd March 2004, issued by respondent No.2 to the functionaries of MSEB, including the appellant, repudiating their stand that the adjustment of `5 lakhs was in terms of the chamber summons dated 29th October 2002, in support of (2000) 1 SCC 722 (2000) 3 SCC 745 (2003) 4 SCC 139 (1978) 4 SCC 58 (1973) 3 SCC 753 his submission that the conduct of the officials of MSEB was contumacious. It was thus, contended that the High Court was justified in not exercising its jurisdiction under Section 482 of the Code, particularly when only summons had been issued to the appellant to appear in court.

14. Before examining the merits of the rival submissions, it would be appropriate to briefly notice the scope and ambit of the jurisdiction of the High Court under Section 482 of the Code. It needs little emphasis that although the jurisdiction of the High Court under the said provision is very wide but it is not unbridled. The High Court is required to exercise its inherent powers under Section 482 of the Code sparingly, carefully and cautiously, *ex debito justitiae* to do real and substantial justice and to prevent abuse of the process of court. One of the situations' when the High Court would be justified in invoking its powers is where the allegations in the first information report or the complaint, as the case may be, taken at their face value and accepted in their entirety do not constitute the offence alleged. (See: *R.P. Kapur Vs. State of Punjab*¹⁶ and *Rupan Deol Bajaj & Anr. Vs. Kanwar Pal Singh Gill & Anr.*¹⁷.) AIR 1960 SC 866 (1995) 6 SCC 194

15. In *G. Sagar Suri* `s case (*supra*), this Court had observed thus:

"Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

16. Bearing in mind the aforestated legal position in regard to the width of power of the High Court under Section 482 of the Code, we shall now advert to the facts at hand. For the sake of ready reference, we may extract the relevant portions of the complaint containing allegations against the appellant. These are:

"7. On or about March 2001 an amount of `5 Lacs was caused to be deposited by the Company as Security Deposit in view of Bank Guarantee to be used for tenders to be filed by the Company with the MSEB from time to time in the future. The payment was made on behalf of the Complainant No. 1 by the Bank of Maharashtra having its registered office at Lokmangal, Shivaji Nagar, Pune. The said amount of `5 Lacs was therefore in the dominion of the Accused. The amount was entrusted/bailed to the MSEB by the Complainant and came under the dominion of the Accused and was to be used as security for future contracts only, if any, and was to be refunded if the Complainant Company so desired, at any time. The amount was not to be used for any other purpose whatsoever. Vide letter dated 9.7.2002, the MSEB acknowledged receipt of `5 Lacs from the Complainant Company.

8. Vide letter dated 16.9.2003 the Company informed the MSEB that it no longer desired (sic) to participate in any tenders floated by the MSEB and sought immediate refund of the amount of `5 Lacs. On 16.9.2003, the Complainant informed the MSEB that it had not participated in any tenders under the said Security Deposit of `5 Lacs. It was expected and legally necessary that the MSEB forthwith refund the said amount to the Complainant as there were no tenders pending filed by the Complainant Company on the date of seeking refund.

9. The Complainants were shocked and surprised that the Accused (who had dominion over the amount of `5 Lacs) started giving false excuses and pretences to avoid refund of the entrusted/bailed amount. The whole approach of the accused was to stifle the refund of the amount dishonestly and deprive the Complainant Company the use of its own money. The response of the Accused and/or on their behalf is of bogus and dodging with an intention to drive away the Complainant and avoid refund anyhow....

11. The Accused have therefore dishonestly and wilfully with common criminal intent suffered the MSEB to refuse refund of `5 Lacs contrary to the provisions of law and deprived wilfully and dishonestly the Complainant Company the use of its money and committed the offence of criminal breach of Trust in terms (sic) of Sec. 405 r/w Sec. 409 r/w Sec. 34 of the Indian Penal Code....."

17. It is manifest from a bare reading of the afore-extracted paragraphs that the gravamen of the complaint against the appellant is that the said amount of `5 lakhs was in the dominion of the accused, which was entrusted to MSEB for a specific purpose and, therefore, by adjusting the said amount for some other purpose, the accused dishonestly and wilfully, with common intention, deprived the complainant the use of the money and committed offence of breach of trust in terms of

Section 405 read with Section 409 IPC.

18. Section 405, IPC defines "criminal breach of trust" to mean:

"405. Criminal breach of trust.--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".

Explanation 1.--A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.--A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

19. It is plain that for constituting an offence of criminal breach of trust, the following ingredients must be satisfied:

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

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

(c) 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." (See:

Indian Oil Corpn. Vs. NEPC India Ltd. & Ors.¹⁸; (2006) 6 SCC 736 Onkar Nath Mishra & Ors. Vs. State (NCT of Delhi) & Anr.¹⁹; Pratibha Rani Vs. Suraj Kumar & Anr.²⁰; Rashmi Kumar Vs. Mahesh Kumar Bhada²¹; R. Venkatkrishnan Vs. Central Bureau of Investigation²².)

20. In the instant case, we are unable to gather from the complaint any averment which may suggest that ₹5 lakhs was entrusted to the appellant, either in his personal capacity or as the Chairman of MSEB and that he misappropriated it for his own use. The basis of the allegation is that the appellant had caused the MSEB to refuse return of the money to the complainant in order to wilfully and dishonestly deprive the complainant of its use. In this regard, it would be useful to refer to the following observations in S.K. Alagh's case (supra):

"As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the 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."

(2008) 2 SCC 561 (1985) 2 SCC 370 (1997) 2 SCC 397 (2009) 11 SCC 737

21. Admittedly, in the present case, the said amount was deposited by the complainant company with MSEB and there is nothing in the complaint which may even remotely suggest that the complainant had entrusted any property to the appellant or that the appellant had dominion over the said money of the complainant, which was dishonestly converted by him to his own use, so as to satisfy the ingredients of Section 405 of the IPC. In the absence of any such specific averment demonstrating the role of the accused in the commission of the offence, we find it difficult to hold that the complaint, even ex-facie, discloses the commission of an offence by the appellant under Section 409 IPC, punishable under Section 406 IPC.

22. We shall now examine whether the appellant is vicariously liable for the afore-mentioned offence with the aid of Section 34 of the IPC. The essence of liability under Section 34 IPC is the existence of a common intention. A common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. In Ramaswami Ayyangar & Ors. Vs. State of Tamil Nadu²³, this Court had observed that the essence of Section 34 IPC is simultaneous (1976) 3 SCC 779 consensus of the minds of persons participating in the criminal action to bring about a particular result. It is true that to attract Section 34, no overt act is needed on the part of the accused if he shares the common intention with others in respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention. Nonetheless, Section 34 IPC clearly envisages pre-concert or pre-planning, which may even develop at the spur of the moment but such plan must precede the act constituting the offence. It is equally true that it may not be possible in every case to have direct evidence of a common intention and it may have to be inferred from the facts and circumstances of each case.

23. In Dani Singh & Ors. Vs. State of Bihar ²⁴, this Court had observed thus:

"Common intention" implies prearranged plan and acting in concert pursuant to the prearranged plan. Under this section a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the (2004) 13 SCC 203 commission of offence showing a prearranged plan and prior concert."

24. Thus, in order to attract Section 34 of the IPC, the complaint in question must, prima facie, reflect a common prior concert or planning amongst the appellant and other accused. Having carefully gone through the complaint, we are of the view that it does not reveal any pre-concert or pre-planning whereby all the accused had decided to misappropriate the said amount. It is pertinent to note that MSEB, in whose coffers the said amount was credited, has not been arraigned as an accused in the complaint. Be that as it may, having come to the conclusion that the ingredients of Section 409 IPC are not satisfied against the appellant, the question of his acting in concert with others does not arise. We are, therefore, convinced that Section 34 IPC is not attracted against the appellant.

25. In light of the above-noted conclusions, we are of the opinion that no prima facie case has been made out against the appellant in respect of offence under Section 409 read with Section 405, even with the aid of Section 34 of the IPC. Therefore, it was a fit case where the High Court should have exercised its powers under Section 482 of the Code by quashing the complaint against the appellant.

26. Resultantly, the appeal is allowed; the impugned order in relation to Criminal Application No.2854 of 2004 is set aside and the order of the Magistrate taking cognizance against the appellant in Complaint No.1881 of 2004 is quashed.

.....J. (D.K. JAIN)J. (H.L. DATTU) NEW DELHI;

OCTOBER 8, 2010 IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO. 1980 OF 2010 (Arising out of S.L.P. (Crl.) No. 7338 of 2007) ASOKE BASAK -- APPELLANT (S) VERSUS STATE OF MAHARASHTRA & ORS. -- RESPONDENT (S) O R D E R In the judgment pronounced on 8th October, 2010, in paragraph 13, the words, "` 5 lacks"

shall be read as "` 5 lakhs."

.....J

[D.K. JAIN]

.....J

[H.L. DATTU]

New Delhi,

October 22, 2010.