Hari Prasad And Ors. vs The State on 26 March, 1953

Equivalent citations: AIR1953ALL660, AIR 1953 ALLAHABAD 660

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. Hari Prasad, Ram Saran and Harianand appeal against their conviction under Sections 406, 477 and 477A, Penal Code, by the Additional Sessions Judge Banaras. The trial was with the help of a jury.

2. The prosecution case, in brief, is that these appellants and one Moti Lal, the complainant, entered into a partnership on 15-7-1948. The partnership firm was to be known as "Moghalsarai Cloth Trading Company". Moti Lal was to contribute Rs. 24,000/- towards the capital and each of the three appellants was to contribute Rs. 8,000/-. Each of the appellants was to share in the profit and loss equally, and the share of Moti Lal in the profit and loss of the business was to be 7/16. The three appellants were to manage the business of the firm. The account-books were to be kept by them or any of them. It was further provided in the deed of partnership that an account would be taken of all the capital assets and liabilities and of the profits and losses of the partnership annually, that the appellants would explain the accounts to Moti Lal and that then it would be signed by all the partners. It further provided that such accounts when signed would be binding on each of the appellants. Moti Lai was not to take active part in the management of the firm.

3. It was in October, 1948, that he suspected that there was something wrong with the management. He asked Nem Chand, his brother-in-law and who happened to be the person to whom any disputes in connection with the partnership were to be referred for decision under para. 17 of the agreement, to check up the accounts. Nem Chand demanded the account books from Ram Saran Bam, one of the appellants who used to write up the accounts, and got the pakka-rokar, pakkakhata and some invoices after a few demands. He did not get kachha-rokar and nam-jakars which are alleged to have been maintained in this firm, though their maintenance is denied by the accused appellants. He suspected the correctness of various entries in the books of account and informed Moti Lal about it. A few days later he learnt about the accused's removing the stock of the firm; he went to the firm and found a truck laden with goods standing in front of the shop. To him, this confirmed the information; he complained to a police constable and later to the Sub-Inspector of police about the accused's removing the property of the firm but, when required by the Sub-Inspector to lodge a report in writing, did not make any report in writing.

4. Some time later, the complaint which has given rise to this case was filed by Moti Lal on 29-11-1948. The complainant just mentioned that he suspected that the accused persons were misappropriating, that they had knowingly made or caused to be made wrong entries in the bahikhata with a view to derive undue benefit, and that on inquiry it was found that the accused persons had already taken away the entire stock of the shop from before and had misappropriated it. The complaint did not specify any particular entries with respect to cash which were considered to be wrong and with respect to amounts misappropriated, or the quantity and nature of stock which had been misappropriated. No effort was made later on to specify precisely these two items.

5. All the accused denied the prosecution allegations. They contended that the partnership firm could not really get into working order in view of Moti Lal's having not contributed the entire amount of Rs. 24,000/-. They denied having made the alleged false entries on the 12th July, 6th August and 12th August, 1948. Harianand explained the alleged removal of goods from the shop in a truck; according to him the goods belonged to traders of Chakia, that those traders were on the truck and that these facts had been conveyed to the police when it made inquiries on the complaint of Nem Chand. It is alleged that the police was satisfied of what was represented to it. Harianand further explains the non-existence of any of the goods in the shop on 12-12-1948, by saying that no goods could be kept in the shop without a license. Cloth was not controlled in 1948 up 'to the 30th of October when it again became a controlled article. This partnership firm failed to secure a license for selling cloth wholesale; it appears that this explanation is correct.

6. The conviction of the appellants for offences under Sections 477 and 477A. I. P. C. is challenged on the ground that on the facts of this case no offence under those sections could be made out. The offence under Section 477 against the accused appellants was on the allegation that they had secreted the account-books, namely kachhi-rokar and nam-jakar and, therefore, secreted valuable securities. It is contended for the appellants that account-books do not come within the definition of the expression "valuable security" under Section 30, I. P. C. and that, therefore, no offence under Section 477, I. P. C. could be made out on the mere basis that the appellants secreted away certain account-books.

We agree with this contention. The words ''valuable security" as defined in Section 30 mean, a document which is or purports to be a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledges that he lies under legal liability or has not a certain legal right. Account-books, as such, do not create any right, and any entry in the account-books cannot be the basis of charging an accused with the liability of what is noted against him. Entries in the account-books can be merely evidence of certain alleged facts and, as such, are relevant evidence In view of Section 34, Evidence Act. Certain entries which might be signed by a constituent may form the basis of a charge against him in view of his acknowledging his liability and the correctness of, the contents noted in that entry. It is not alleged that any entry in these account-books was, of such a type and consequently the secreting of an account-book with respect to that particular entry would not amount to the secreting of a valuable security. We, therefore, hold that the account-books are not "valuable security" and that therefore no offence under Section 477, I. P. C. is made out against the accused appellants, even if they had secreted the kachhi-rokar and the nam-jakar bahis of this firm.

7. Section 477A, I. P. C. makes a clerk, officer or servant or one employed or acting in the capacity of any of these liable to certain punishments in case any of those persons do any of the things mentioned in the section in connection with any book, paper writing, valuable security or account which belongs to or is in the possession of that person's employer or has been received by him for or on behalf of his employer. The contention for the appellants is that Ram Saran Ram was neither a clerk, nor an officer nor a servant of the firm and, therefore, he could not be guilty of any offence under Section 477A, I. P. C., even if he had falsified certain entries in the account-books. The prosecution does not allege that Ram Saran Ram was appointed by the firm as a clerk, officer or servant, what is alleged is that he performed the work which was to be done by a clerk and that consequently he acted in the capacity of a clerk when he made entries in the account-books and that, therefore, he would be guilty of the offence under Section 477A if the other ingredients of the offence under that section were made out.

Reliance was placed on the cases of -- 'Monindra Mohan v. Srish Chandra', AIR 1932 Cal 464 (A) and -- 'Mahomed v. Mahomed Idris', A. I. R. 1925 Bind 328 (B). We do not agree with this contention. It appears to us that only such a person would be guilty under Section 477A who is employed by the firm in any of these capacities, namely, as a clerk or officer or servant. Employment connotes a sort of different relationship between the person employed and the employer; the two are different. There has to be some basis of service; it may be honorary or it may be on remuneration. Ram Saran Ram was not so appointed by the persons who were in charge of the management of the firm. Paragraph 8 of the agreement of partnership simply mentioned that the three appellants would manage the business of the firm, and paragraph 9 simply provides that all necessary and proper books of account would be kept properly posted by the persons or any of them named in paragraph 8 above. This, to our mind, does not indicate that the three appellants or any of them had been appointed a clerk, or servant of the Company. In our judgment, paragraph 9 simply meant that the accounts of the Company would be maintained by these persons Jointly or singly as the case may be, and that Moti Lal would have nothing to do with the maintenance of accounts; in fact Moti Lal was not to take any active part in the management of the firm.

Normally, it is the duty of the owners or the proprietors of a firm to do everything connected with the firm. They may for the sake of convenience pass on this duty of theirs to an employee, or they may arrange among themselves that certain duties would be done by some of them and other duties would be performed by others. The provisions of paragraphs 8 and 9 of this agreement appear to us to be a sort of mutual arrangement among the persons, as such, with respect to the maintenance of accounts. The terms of para. 10 of this agreement are that any sort of account maintained by these persons would have no binding effect on any of them until those accounts had been explained to and signed by Moti Lal. If Moti Lal does not sign these accounts these accounts, it could be said, would not be binding on any of the appellants. The accounts which they were expected to maintain may, therefore, be termed to be just draft notes of what took place with regard to the business of the firm. We do not, therefore, read the provisions of para. 9 to mean that the appellants or any of them had been employed as a clerk or servant or officer. It follows, therefore, that no one could be guilty of an offence under Section 477A, I. P. C. on account of one of the main ingredients necessary for an offence under that section not existing.

8. In -- 'AIR 1932 Cal 464 (A)', cited above, the accused was charged with having misappropriated a sum of Rs. 800/-, a part of the sum of Rs. 1200/- said to have been contributed as a contribution to the share of the complainant in a partnership firm. The Magistrate discharged the accused holding that a charge under Section 477A might have been framed against the accused if he had been a clerk or a servant, but having regard to the relationship of partners which existed between the parties no such charge could subsist in the case. This view was held to be erroneous and it was observed that the mere fact that a partnership existed, is no answer in a properly proved case to a charge of falsification of accounts by one partner who is in charge of the books. The matter is not dealt with at any length, and we do not say that one who is a partner in a firm can never be guilty of an offence under Section 477A, I. P. C. If a person who is a partner has also taken upon himself the status of a clerk or servant or officer of the Company, he could then be guilty of an offence under Section 477A, I. P. C. if the other ingredients of the offence are made out against him. This case, therefore, does not in any way go against the view expressed by us.

9. In -- 'AIR 1925 Sind 328 (B)', the partner concerned had been appointed, a manager with a salary of Rs. 30/- a month and it was held that where a partner of a firm was appointed to manage its business and to write its accounts and he falsified its accounts, he was liable under Section 477A. I. P. C. This case also, therefore does not hold that in the absence of a partner's appointment as a manager, he would be guilty under Section 477A. I. P. C. if he does any of the acts mentioned therein.

10. We, therefore, hold that Ram Saran Ram appellant who wrote the account-books cannot be guilty under Section 477A, I. P. C., even if certain entries were false.

11. When Ram Saran Ram cannot be guiltv under Section 477A. I. P. C., the other two appellants cannot be guilty of abetting the offence under Section 477A, I P. C. by Ram Saran Ram. Moreover, there is no evidence on the record that these two appellants, namely, Hari Prasad and Harianand had in any way abetted Ram Saran Ram in making false entries in the account-books. The learned Sessions Judge ignored this aspect of the matter and did not draw any attention of the jury to the absence of evidence with respect to these persons abetting the making of false entries by Ram Saran Ram.

12. There remains then the third offence under Section 406, I., P. C. of which these appellants have been convicted. We have already indicated that the complaint did not specify precisely the amount misappropriated or the stock which had been misappropriated, We have also indicated the basis for the charge of misappropriation. The only basis for the charge under Section 406 seems to be the suspicion that certain entries in account-books were wrong and that no stock was found on a certain date when the police searched the premises of the firm under the orders of the Court in order to take charge of the stock present there. The absence of stock on that date is sufficiently explained by Harianand in his statement.

The allegation about the misappropriation of cash has been sought to be established with respect to five items, two of which were with respect to the payments to the firm of Badri Das Gopalka and of three items of money said to have been paid to the firm Raghunath Prasad Deokinandan. (His

Lordship considered the evidence and proceeded:)

13. The charge to the jury delivered by the learned Sessions Judge was bad in law; the learned Sessions Judge did not lay the entire evidence with the possible criticism against it before the jury. He did not mention what Lochan Ram had stated in cross-examination. In the charge the learned Sessions Judge just mentioned briefly the statements-in-chief of the various witnesses and then left it to the jury to come to a conclusion whether to believe those statements or not; this is a very unsatisfactory way of summing up the case for the jury. The Sessions Judge is expected to place the entire evidence before the jury in a form that could be easily intelligible to and under stood by the jurors. He is expected to help the jury in not only refreshing its memory in regard to the evidence tendered but in appreciating that evidence and coming to a proper conclusion with respect to its credibility, and this he can do only when he fairly puts before the jury all the relevant criticism and its effect. The present charge to the jury is singularly lacking in such summing up of the case. We are therefore of opinion that the charge of the learned Sessions Judge to the jury with respect to the offence under Section 406, I. P. C. is bad both on account of misdirection and non-direction, and that the conviction of the appellants of the offence under Section 406, I. P. C., should be set aside. What we have said above about the nature of the allegations and the evidence in support of those allegations does not justify an order of retrial of the accused for an offence under Section 406, I. P. C- In fact it appears to us, as contended for the appellants, that this was a case eminently fit for a civil court and was not a case for a criminal court.

14. We may further refer to another illegality committed by the learned Sessions Judge in the trial of this case and it relates to his admitting the evidence of Jheemal Singh and Abdul Majid Sub-Inspector on record under Section 33, Evidence Act without any proof, what to say of strict proof, of any of the conditions precedent for taking the evidence on record under Section 33, Evidence Act. It appears that Jheemal Singh used to reside at Moghal-Sarai, though a resident of some village, and that the constable who went to serve the summons on him could not find him at his house, he having gone to his village residence. This in ability to find Jheemal Singh cannot be said to lead to the conclusion that Jheemal Singh could not be found with a little more diligence, or with an adjournment for a short period of the sessions case it could not have been possible to secure the presence of Jheemal Singh.

15. Sub-Inspector Abdul Majid happened to be suffering with a boil in the leg and was therefore unable to attend the court; this is in the report of the constable who served the summons on him & it is also in the endorsement made on that summons by the Sub-Inspector himself. No evidence was recorded about the ailment of the Sub-Inspector Abdul Majid or about the period for which he could not attend the court in any circumstances. It might have been that he could have come to Court on a conveyance. Anyway, a short adjournment of the sessions case would have again, enabled the court to secure his presence.

16. Nothing has been said by the learned Sessions Judge in allowing the application of the District Government Counsel for taking the statements of these two witnesses on record as to why he considered it justified to allow the application. His order is just of one word "Allowed"; this is very unsatisfactory. Sessions Judges should realise the importance of not only following strictly the

provisions of law, especially when it has been held by the highest court that evidence of witnesses not appearing in court should not be taken on record under Section 33, Evidence Act without strict proof of the conditions justifying its being taken so on record and also when it is usually very necessary that a witness should be examined in the court so that parties be in a position to examine and cross-examine him fully according to the needs of the case. What we wish to stress is that it is not a mere matter of formality that a statement previously recorded of a witness who is not present should be taken on the record of a sessions case in view of Section 33, Evidence Act as a matter of course.

17. In view of the above, we allow the appeal, set aside the order of the court below, discharge the appellants of the offences of which they were convicted and acquit them. The accused are on bail; they need not surrender. The fines, if paid, may be refunded.