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ANIL SARAN

v.

THE STATE OF BIHAR AND ANR.

AUGUST 24, 1995

B

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Code of Criminal Procedure, 1973 : Sections 190 and 192.

C

Offence—Cognizance of—When takes place—Held cognizance takes place as soon as the Magistrate applies his judicial mind to the offence stated in the complaint.

D

Chief Judicial Magistrate—Complaint before—Transfer of case to Judicial Magistrate without taking cognizance—Magistrate examining witnesses and issuing process—Held Magistrate committed no error of jurisdiction in taking cognizance of offence.

E

Indian Penal Code, 1860 : Section 406.

Partnership property—Criminal breach of trust by partner—Held it must be shown that property was entrusted under a special contract and he held the property in a fiduciary capacity.

F

A partnership firm, consisting of three partners viz. the appellant, the second respondent and one A, entered into an agreement with the first accused (before the Trial Court) for exhibition of a film owned by the firm. Under the terms of the agreement, the film along with the sale proceeds was to be returned after exhibition. On failure of the first accused to do so, the second respondent filed a complaint before the Chief Judicial Magistrate, Patna that the first accused in collusion with the appellant and the other partner of the firm stealthily and illegally misappropriated the collections and dishonestly made wrongful gain for themselves and caused wrongful loss to the complainant and the partnership firm. The Chief Judicial Magistrate examined the complainant and transferred the case to Judicial Magistrate-II who examined witnesses and issued process under sections 406 and 420 of the Indian Penal Code. The appellant's application under section 482 of the Code of Criminal Procedure, 1973 was dismissed by the High Court on the ground that the complaint *prima facie*

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disclosed commission of the alleged offences.

In appeal to this Court it was contended for the appellant that (i) without taking cognizance of the case the Chief Judicial magistrate committed manifest jurisdictional error in transferring the complaint to the Magistrate who took further action therein; (ii) the appellant, being a partner in the complainant firm, cannot be said to have committed criminal breach of trust of his own funds and therefore, it is a case of civil liability only.

Dismissing the appeal, this Court

HELD : 1. The word 'cognizance' has not been defined in the Code of Criminal procedure. But it is now settled law that the court takes cognizance of the offence and not the offender. As soon as the Magistrate applies his Judicial mind to the offence stated in the complaint or the police report etc. cognizance is said to be taken. Cognizance of the offence takes place when the Magistrate takes Judicial notice of the offence. Whether the Magistrate has taken cognizance of offence on a complaint or on a police report or upon information of a person other than the police officer, depends upon further steps taken pursuant thereto and the attending circumstances of the particular case including the mode in which case is sought to be dealt with or the nature of the action taken by the Magistrate. [61-H; 62-A-B]

2. The power to take cognizance has been conferred on a Magistrate by section 190(1) of the Code, and he would not be denuded of this power because the case has come to his filed pursuant to some illegal order of the Chief Judicial Magistrate. The former would be exercising his power of taking cognizance even in such a case, because of his having received a complaint constituting the offence. It would not be material, for this purpose, as to how he came to receive the complaint - directly or on transfer from the Chief Judicial Magistrate. Therefore, no error of jurisdiction was committed by the Judicial Magistrate in taking cognizance of the offence. [62-E-G]

3. Partnership firm is not a legal entity but a legal mode of doing business by all the partners. Until the firm is dissolved as per law and the accounts settled, all the partners have dominion in common over the property and funds of the firm. Only after the settlement of accounts and allotment of respective share, the partner becomes owner of his share. However, criminal breach of trust under section 406 of Indian Penal Code

A is not in respect of the property belonging to the partnership firm, but is an offence committed by a person in respect of the property which has been specially entrusted to such a person under a special contract and he holds that property in fiduciary capacity under special contract. If he misappropriates the same, it is an offence. In the instant case, it is not the case of the complainant that the appellant and the other accused were entrusted with the dominion of the property of the firm in their capacity as partners of the complainant firm. Under these circumstances, it cannot be said that the imputations alleged against the appellant have been done in his capacity as a partner of the firm. Whether the offence has been made out, whether he is liable and what are the defences open to him are not matters at this stage for consideration. It is for the Magistrate to proceed with the trial and to deal with according to law. [63-A-D; E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1026 of 1995.

D From the Judgment and Order dated 28.11.90 of the Patna High Court in CrI. M. No. 11250 of 1989.

S.K. Verma for the Appellant.

K.K. Gupta for the Respondents.

E The following Order of the Court was delivered :

Leave granted.

F The appellant was a partner in M/s. Agjevinath Films along with the second respondent, Shiv Prakash, and another person, Ajit Jai Tilak. The firm was constituted to distribute, exhibit and exploit the cinematography films. The firm had entered into an agreement with producer, Bhojpuri film for distribution of 'Hamari Dulhaniya' and had two prints of the films obtained from the laboratory at Bombay and were arranged for exhibition in Roopak Cinema, Patna. It is the case of Shiv Prakash, the complainant on behalf of M/s. Ajgevinath Films, that the first accused, namely, M/s. Sapna Enterprises, had contracted on June 22, 1988 to take the film, exhibit the same and account for the proceeds in terms of the contract. Pursuant thereto, M/s. Sapna Enterprises was entrusted with the second copy of the film for exhibition and they exhibited the film from July, 1, 1988. But the first accused had not returned the print to the complainant- second respon-

dent with ulterior and dishonest intention to make wrongful gain and to cause wrongful loss to the second respondent. Subsequently, it came to the knowledge of Shiv Prakash that the first accused colluded and conspired with the appellant and Ajit with an intention to defraud the second respondent; and the firm exploited the second copy of the film in the said cinema and "they stealthily and illegally misappropriated collections and dishonestly made wrongful gain for themselves and caused wrongful loss to the complainant and the said concern." It was also alleged that the appellant and Ajit induced the first accused by conspiracy to illegally obtain the films prepared for themselves and fabricated the documents and thereby Ajit, the first accused firm and the appellant, in collusion and conspiracy with common intention to do mischief, committed the offence referred to earlier. Admittedly, the complaint was filed before the Chief Judicial Magistrate, Patna who, after examining the complainant, transferred the case to Judicial Magistrate-II, Patna whose Presiding Officer then was Mr. A.K. Srivastava. The learned Magistrate examined three witnesses and thereafter issued process to the appellant and third respondent under ss.406 and 420 IPC. The appellant thereafter filed an application under s.482 of the Code of Criminal Procedure, 1973 (for short, 'the Code') before the High Court, Patna to quash the complaint.

The High Court in the impugned order dismissed the application holding that the complaint *prima facie* discloses the offence punishable under the sections for which cognizance was taken and process was issued to the appellant and another. The question, therefore, is whether the complainant-second respondent made a *prima facie* case to take cognizance of the offence and issued process to the appellant and others.

It is contended for the appellant that the Chief Judicial Magistrate, having entertained the complaint, was required to examine other witnesses, take cognizance and then could have transferred the case, if he so desired, to a competent Magistrate subordinate to him as envisaged by s.192(1) of the Code. But, in this case without taking cognizance, the Chief Judicial Magistrate committed manifest jurisdictional error in transferring the complaint to the Magistrate who took further action therein.

We find no force in the contention. Though the Code defines, "cognizable offence" and "non-cognizable offence", the word "cognizance" has not been defined in the Code. But it is now settled law that the court

A takes cognizance of the offence and not the offender. As soon as the Magistrate applies his judicial mind to the offence stated in the complaint or the police report etc. cognizance is said to be taken. Cognizance of the offence takes place when the Magistrate takes judicial notice of the offence. Whether the Magistrate has taken cognizance of offence on a complaint or on a police report or upon information of a person other than the police officer, depends upon further steps taken pursuant thereto and the attending circumstances of the particular case including the mode in which case is sought to be dealt with or the nature of the action taken by the Magistrate. Under sub-section (1) of section 190 of the code, any Magistrate may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence. (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

D Sub-section (1) of Section 192 has conferred a special power on the Chief Judicial Magistrate, as, normally, the Magistrate taking cognizance of an offence, has himself to proceed further as enjoined by the Code. But, an exception has been made in the case of Chief Judicial Magistrate, may be because he has some administrative functions also to perform. A Magistrate who receives the case on transfer and takes cognizance would not become incompetent to do so merely because the sanction of transfer of the case to his file is not in accordance with law. The power to take cognizance has been conferred on a Magistrate by s.190(1) of the Code, and he would not be denuded of this power because the case has come to his file pursuant to some illegal order of the Chief Judicial Magistrate. The former would be exercising his power of taking cognizance even in such a case, because of his having received a complaint constituting the offence. It would not be material, for this purpose, as to how he came to receive the complaint - directly or on transfer from the Chief Judicial Magistrate.

G We are, therefore, of the opinion that no error of jurisdiction was committed by the Judicial Magistrate in taking cognizance of the offence.

H It is next contended that the appellant, being a partner in the complainant firm, cannot be said to have committed criminal breach of trust of his own funds and that, therefore, it is a case of civil liability only. The contention that one partner cannot commit criminal breach of trust

against other partners, though *prima facie* alluring, on facts of this case, it does not appear to be tenable. Partnership firm is not a legal entity but a legal mode of doing business by all the partners. Until the firm is dissolved as per law and the accounts settled, all the partners have dominion in common over the property and funds of the firm. Only after the settlement of accounts and allotment of respective share, the partner becomes owner of his share. However, criminal breach of trust under s.406 is not in respect of the property belonging to the partnership firm, but is an offence committed by a person in respect of the property which has been specially entrusted to such a person under a special contract and he holds that property in fiduciary capacity under special contract. If he misappropriates the same, it is an offence.

At this stage, we have only to see whether the allegations made in the complaint make out the offence *prima facie*. It is not the case of the complaint that the appellant and the other accused Ajit were entrusted with the dominion of the property of the firm in their capacity as partners of the complainant firm. On the other hand, the complainant firm entered into a contract with the first accused firm-M/s. Sapna Enterprises. entrusted the second film for exhibition and for accounting the sale proceeds in terms of the contract and to return the film. They had neither accounted for, not returned the film. The first accused, the appellant and Ajit, therefore, were alleged to have committed the offences in question.

Under these circumstances, we do not think that the imputations alleged against the appellant have been done in his capacity as a partner of the firm. Whether the offence has been made out, whether he is liable and what are the defences open to him are not matters at this stage for consideration. It is for the learned Magistrate to proceed with the trial and to deal with according to law.

The appeal is accordingly dismissed.

T.N.A.

Appeal dismissed.