

Anthony D'Mello and Others Vs Joseph Mathew Pereira

Court: Bombay High Court

Date of Decision: March 10, 1937

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 177

Citation: AIR 1937 Bom 371

Hon'ble Judges: Broomfield, J

Bench: Division Bench

Judgement

Broomfield, J.

This is an application for revision of an order of discharge made by the Presidency Magistrate, Additional Court,

Esplanade, Bombay, in a case of criminal breach of trust. The prosecution was instituted on behalf of a firm called the Excelsior Trading Company,

which appears to be a one man firm owned by Gomes, petitioner 2, dealing in rolled gold ornaments and other articles. So far the only evidence in

the case consists of the deposition of petitioner 1 who is the accountant in this firm. His evidence is that the accused was employed by the firm as a

travelling salesman and canvasser. He was given articles valued at about Rs. 4,500 for sale, and on 11th November 1935, he left Bombay to travel

in Gujarat and Karachi. He returned to Bombay on 16th December 1935, and was asked to render his accounts. Between 17th and 19th

December, he came to the office every day and returned all the goods which were entrusted to him except goods of the value of Rs. 198-8-0.

With regard to these he produced cash memos showing that the goods had been sold. He was asked to produce the money for these goods but

failed to do so. He never has produced the money. On 6th January 1936 he was dismissed. On 7th January 1936 a letter was received from the

accused's pleader with which a statement of account was sent and it was stated that he was unable to produce the money unless given time. The

prosecution case is that he committed criminal breach of trust in respect of this sum of Rs. 198-8-0. The learned Magistrate in his order says:

Mr. D'Cunha for the prosecution admits that these goods were sold outside Bombay, in Karachi and other places. The criminal breach of trust

with which the accused is charged is in respect of the money which the accused had received outside" Bombay by the sale of these goods. In my

opinion the facts of this case are covered by the decision of the Pull Bench of the Bombay High Court reported in *In re Jivandas Savachand* AIR

1930 Bom. 490 and that this Court has no jurisdiction to try this case. Accused is discharged.

2. In my opinion the learned Magistrate's finding that he has no jurisdiction is at any rate premature. It is true that the allegation against the accused

is that he committed criminal breach of trust in respect of moneys which were received by him outside Bombay. But it does not follow that the

misappropriation took place outside Bombay. We are informed that the complainant's case is that the accused had to hand over the money in

Bombay, that there was no question of misappropriation until he was called upon to hand it over and failed to do so and that the breach of trust

consisted of the dishonest retention of the money or some of it in Bombay. There is nothing in the evidence so far recorded which is inconsistent

with this case. It is true that the police charge-sheet states the charge to be that the accused at Bombay between 11th November 1935 and 16th

December 1935 did commit criminal breach of trust as a servant in respect of rolled gold jewellery valued at Rs. 198-8-0. But the prosecution is

not limited to the form of charge which the police have chosen to put in the charge-sheet. The prosecution case being, as apparently it is, that the

accused brought the money or some of it to Bombay, the case is *prima facie* governed either by Section 177 or Section 181(2), Criminal P.C. It

may no doubt be difficult for the prosecution to prove that any part of the offence of criminal breach of trust was in fact committed in Bombay and

it would have been safer I think to lay the venue in Karachi or one of the places where the proceeds of the goods sold were admittedly received.

The Court there would have jurisdiction having regard to Section 181(2) wherever the actual misappropriation took place. But it is "impossible to

say at this stage that the Bombay Court has no jurisdiction.

3. There is Section 182 of the Code also to be considered. If there is a doubt as to whether the criminal breach of trust was committed in Karachi,

for instance, or Bombay, that I think would give the Bombay Court jurisdiction. *Emperor v. Mahadeo* (1910) 32 All. 397 is a case in which the

facts were almost precisely similar. One M was employed as an agent by a firm in Mirzapur. Goods were entrusted to him for sale in various

districts in lower Bengal, and from time to time as he sold goods he remitted money to his employers at Mirzapur. When called upon to furnish

accounts, he offered to furnish Rs. 500 as a deposit, but did not submit any account. It was held that the Courts at Mirzapur had jurisdiction to try

M for criminal breach of trust. No doubt Tudball, J. followed an earlier decision of the Allahabad High Court, *Queen-Empress v. O'Brien* (1896)

19 All 111 where jurisdiction was said to depend upon Section 179. That is contrary to the view which has been taken by a Full Bench of this

Court in *In re Jivandas Savachand* AIR 1930 Bom. 490. But the learned Judge also said: "'S. 182 of the Code would apply, it seems to me,

equally well'". I can see no reason why Section 182 should not be applied if the facts are as alleged. Of course if it should appear, after all the

evidence is heard, that there is really no doubt about the matter that there was no misappropriation or conversion or wrongful disposal in Bombay

at all, and that if any offence was committed it must have been outside Bombay, the plea of want of jurisdiction would have to be sustained and

there could be no conviction. But that stage has not been reached.

4. *Jivandas Savohand*, *In re Jivandas Savachand* AIR 1930 Bom. 490 relied on by the Magistrate does not cover the facts of this case. There was

no allegation there that any money was payable in Bombay had been misappropriated in Bombay, "he Full Bench was only concerned, directly at

any rate, with the application of Section 179 which is not relied upon in the "present case at all. It is not apparently the case of the petitioners that

the Bombay Court has jurisdiction because it was the duty of the accused to account in Bombay, nor indeed has that fact been proved as yet.

There is some authority for that view. I may mention *Paul De Flondor Vs. Emperor*, and *Yacoob Ahmed v. V.M. Abdul Ganny* AIR 1928 Rang

217. There is no doubt that that is the rule in England. The difficulty seems to me to be to reconcile such a rule with the provisions of the Criminal

Procedure Code. However, as the petitioners do not, as I say, put their case on that ground and as the point has not been argued before us, I

prefer to express no opinion on that aspect of the case. Quite apart from it, it is clear that the learned Magistrate's order of discharge is wrong and

must be set aside.

N.J. Wadia, J.

5. Section 181(2), Criminal P.C., provides that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried

by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the

accused person, or the offence was committed, and the question in this case is whether the offence can be tried in Bombay. The applicants"

contention is that it was only when the accused returned to Bombay on 16th December 1935, and failed to produce the money when called upon,

that the complainant knew that he had misappropriated it, and that as the accused had to account for the goods and money in Bombay it must be

presumed that the dishonest misappropriation or conversion had been committed in Bombay between 16th and 19th December, during which

period the accused attended the office in Bombay and produced the unsold goods but failed to pay up the price of the goods sold.

6. The learned Government Pleader who appears for the Crown supports the application for revision. The facts in *In re Jivandas Savachand* AIR

1930 Bom. 490 on which the learned Magistrate has relied, were in my opinion very different from those in the present case. In that case the

complainant had entered into a partnership with the accused in Bombay in a business to be carried on at Rangoon. Under the partnership

agreement, the head office of the firm was to be in Bombay and accused 1 was to manage the business at Rangoon in accordance with the

instructions issued to him by the complainant. Accused 1 was to send to the head office weekly statements of accounts of the business transacted

by him on behalf of the partnership. The accounts of the partnership were agreed to be made up once in a year, the profit and loss account to be

forwarded by accused 1 to the head office immediately after the accounts were made up, and the distribution of profit and loss was to be entered

up thereafter in accordance with the instructions received from the head office. Accused 1 went to Rangoon, and used to send weekly statements

of accounts to the head office in Bombay. On examination of the accounts sent by the accused, the complainant discovered that the accused had

dishonestly misappropriated large sums of moneys belonging to the firm and had falsified accounts. The charge against the accused there was that

the accused misappropriated the firm's moneys in Rangoon and falsified the accounts in Rangoon, and the question was whether they could be

tried for those offences in Bombay. On the admitted facts they could not be tried in Bombay u/s 181, Criminal P.C. It was contended that they

could be tried in Bombay u/s 179 of the Code. The Court held that Section 179 was not applicable because the loss to the principal, which had

occurred in Bombay, was not a necessary ingredient in the offence of criminal breach of trust, and that although the accused had to render

accounts, and did in fact deliver accounts alleged to be false in Bombay, it did not amount to a dishonest use of the money in Bombay and

therefore the Bombay Court had no jurisdiction. It could not be said in that case that there had been a dishonest use in Bombay of money or

property which had admittedly never left Rangoon.

7. The applicant in the present case does not rely on Section 179 and the decision in *In re Jivandas Savachand* AIR 1930 Bom. 490 is not there

fore directly in point. According to the applicant the dishonest misappropriation or conversion took place in Bombay between 16th and 19th

December, and if the applicant can prove this, the offence would have been committed in Bombay itself and not in Karachi or anywhere in Gujarat,

where the articles are said to have been sold and the money received by the accused Certain remarks of Madgavkar, J. in *In re Jivandas*

Savachand AIR 1930 Bom. 490 appear to me to be very appropriate to the case before us. After referring to the decision of Mukerji, J. in

Gunananda Dhone Vs. Lala Santi Prakash Nandy, he said (p. 85):

I agree entirely with the view of the learned Judge that criminal breach of trust is not an offence which counts as one of its factors the loss, which is

the usual consequence of the act, and that it is the act itself which in law amounts to the offence, apart from any such consequence; and therefore

the jurisdiction to try an offence of criminal" misappropriation or criminal breach of trust is governed by Section 181, Sub-section (2), and not by

Section 179. The only doubt in my mind is as regards the class of cases referred to in the concluding portion of the judgment, where by reason of

the secrecy observed by the accused, a doubt exists as to the exact manner, point of time or place where the misappropriation and conversion,

etc., takes place, all matters within the special knowledge of the accused himself, and not of the complainant who can only judge from any overt

act of the accused showing the dishonesty, which is essentially necessary to be proved. In such cases, if and where the accused is under liability to

render accounts at a particular time and fails to do so, such failure may be the first overt dishonest act to the complainant's knowledge, and the

Court within the local limits where such failure takes place may have jurisdiction. But where the Sence is completed at one place, the further liability

to render accounts at another place and failure in rendering such false accounts at the second place does not confer jurisdiction u/s 179 upon the

Magistrate at the latter place since the offence is already completed at the former place. At the same time, as is conceivable, where the offence is

not completed as far as the knowledge and belief of the complainant goes, in the place where the money was first sent, but the dishonest intent

which is a necessary ingredient is only completed not merely as evidence but actually as factum of dishonesty by some act such as the rendering of

accounts, then I am unable to say that even u/s 181, Sub-section (2), the criminal Courts in the latter place are excluded from jurisdiction. In my

opinion the matter entirely depends upon where the act of criminal misappropriation including the dishonest intent is completed as far as the

knowledge and belief of the complainant according to the complaint go. In such a case I agree with Mukerji, J. that the Courts in the place where

the act is completed may have jurisdiction even though they may be different from the place where the money has been originally sent by the

complainant.

8. Although the mere fact of non-accounting cannot constitute the offence of criminal breach of trust, it may in certain circumstances be evidence

from which dishonest misappropriation or conversion in Bombay might be inferred if complainant succeeded in showing that the accused had the

money with him in Bombay between 16th and 19th December. At this stage of the case therefore it is not possible to say that no offence was

committed in Bombay at all. Reference may also be made to Section 182, Criminal P. G., under which when it is uncertain in which of several local

areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a

continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may

be inquired into or tried by a Court having jurisdiction over any of such local areas. In *Emperor v. Mahadeo*,² in which the facts were very similar

to those before us, it was held that Section 182 would apply to such a case. The view taken by the learned Magistrate that he had no jurisdiction is

therefore in my opinion wrong. I agree with the order proposed to be made.

Per Curiam.

9. Rule absolute. Order of discharge set aside. Case to be proceeded with according to law.