

PETITIONER:
ANIL SARAN

Vs.

RESPONDENT:
THE STATE OF BIHAR AND ANOTHER

DATE OF JUDGMENT 24/08/1995

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
HANSARIA B.L. (J)

CITATION:
1996 AIR 204 1995 SCC (6) 142
JT 1995 (6) 428 1995 SCALE (5) 216

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted.

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 cinematograph 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. Agjevinath 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 respondent 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.405 and 420 IPC. The appellant thereafter filed an application under s.482 of the Code of Criminal Procedure, 1973 [for short, 'the Court'] 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 issue 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/92(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 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 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.

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.

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

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 complainant 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, nor 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.