

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.M.C. 2562/2007
PRAKASH G.DUDANI Petitioner
Through Mr. Pramod Kumar, Advocate.

versus
STATE & ORS Respondent
Through Mr. Arvind Kumar Gupta, APP.
Mr. V.K. Tandon, Adv. for R-2 to 4.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

% **21.09.2010**

1. Jay Pee Exports Limited had availed of credit facilities under a consortium agreement with Canara Bank and Bank of Baroda. They had executed documents, furnished guarantee bonds, deposited title deeds, securities etc. The two consortium banks initiated proceedings for recovery Rs. 15,47,06,412.7/- before the Debt Recovery tribunal (DRT). Pursuant to One Time Settlement (OTS) and on payment of Rs.550 lacs towards full and final settlement, the claims of the banks were settled and the recovery proceedings before the DRT were withdrawn.
2. On 18.10.2005 the Petitioner wrote a letter to the Canara Bank for return of the collateral security in the form of seven Kamdhenu receipts or FDRs for Rs. 3,52,132/- . It was stated that as per the terms of the

settlement, these FDRs should be returned or the amount be paid. As there was no response, a legal notice dated 11.11.2005 was issued. By their letter dated 7.12.2005, Canara Bank disputed the claim of the petitioner and denied their liability to pay Rs. 3,52,132/- or release the FDRs in terms of the OTS.

3. The petitioner, relying upon their proposal for OTS and the terms thereof as stated in their letter dated 24.11.2004 and the acceptance by the Canara Bank by their letter dated 7.1.2005 filed a criminal complaint. It was alleged that the respondent bank have committed breach of trust under section 409 of the Indian Penal Code, 1860 (IPC for short) by not returning the collateral security i.e. seven Kamdhenu receipts/FDRs.

4. The trial court and the Additional Sessions Judge have held that the complaint does not disclose commission of a criminal offence and the dispute between the parties is a civil dispute.

5. Learned counsel for the Petitioner relies upon the term of the OTS agreement in the correspondence/letters dated 29.11.2004 and 7.1.2005 written by Jay Pee Exports Ltd and Canara Bank respectively. It is stated that on payment of OTS amount the bank was/is under obligation to release all charges, liens and documents which were available with them

as collateral security. On the other hand the stand of Canara Bank, as is apparent from their letter dated 7.12.2005, is that by mistake and due to error the FDRs/Kamdhenu receipts were not appropriated against the outstanding liabilities. The respondent bank was in dark and not aware about their failure and error to make the said adjustment. If the bank was aware of the Kamdhenu receipts/FDRs they would have adjusted the same. It is stated that it was not the intention and agreed upon that on payment of the OTS amount, the FDR/Kamdhenu receipts will be released. This was not disclosed in the proposal and not discussed in the negotiations. The bank had written off liability and interest of Rs. 432.06 lacs in the OTS.

6. The petitioner had filed W.P.(C) No. 1689/09 for release of Kamdhenu receipts on similar grounds. The writ petition was dismissed leaving it open for the petitioner to approach civil court or consumer forum. It was observed that it was not appropriate to exercise discretion under Article 226 of the Constitution.

7. Criminal Breach of Trust requires dishonest intention by a person who misappropriates or converts property to his own use or uses or disposes of the property. Mere breach of a contract or violation of a duty

under a contract is not criminal breach of trust unless the act is dishonest and manifests itself in some overt act. Similarly mere violation of law without dishonesty even when other ingredients of Section 405 IPC are satisfied does not amount criminal breach of trust. The essence of criminal misappropriation is that the property comes in possession of the accused in some neutral manner and he misappropriates or converts it to his own use dishonestly. Dishonesty is defined in Section 24 IPC. It implies intention of causing unlawful gain or loss of property to which person gaining or losing is not or is entitled. Dishonesty must relate to appropriation or wrongful conversion. The test to be applied is the intention of the accused at the time of the act complained of. A bonafide mistake, belief, or claim of right does not imply dishonesty. Without dishonest intention no offence under Section 405 read with Section 409 IPC can be made out.

8. The averments made in the complaint relate to interpretation of the clauses of the OTS. This is a civil matter. Contention and the stand of the respondent bank is that the Kamdhenu receipts/FDRs were not to be refunded. There was no consensus ad idem. The relevant portion of the letter dated 7th December, 2005 written on behalf of the respondent

Canara Bank reads:-

“Had the said Fixed Deposit been brought by you to the notice of my client, my client would have certainly appropriated the amount lying under the said deposit to the liability of your client before settling the liability of your client by way of OTS. The said amount could not be appropriated as aforesaid on account of suppression of material facts by your client. It was a bonafide mistake of my client that the aforesaid deposit was not noticed by the bank and thus the same remained unappropriated. The said mistake could not be noticed despite reasonable diligence and the said fact came to the knowledge of my client only when your client after entering the OTS settlement claimed the amount lying under the fixed deposit. It is reiterated that before making a huge sacrifice by way of writeoff the liability and unapplied interest under the OTS amounting to Rs. 432.06 lacs, the amount of the deposit was certainly required to be appropriated against the pre-OTS liability. Notwithstanding the bonafide mistake of my client which could not be known to my client despite due diligence, your client cannot take advantage of its own wrong.”

9. The petitioner herein had filed before the trial court a copy of the claim petition that had been filed by the consortium banks before the Debt Recovery Tribunal. The claim petition includes list of current securities available with the banks for adjustments/payment of the dues. The Kamdhenu receipts/FDRs are not mentioned in the said list. This

clearly supports the stand of the respondent Canara Bank taken in the letter dated 7.12.2005.

10. Learned counsel for the petitioner has relied upon decisions in the case of ***N. Bhargavan Pillai and Another Vs. State of Kerala*** 2005 Supreme Court Cases (Cri)135 and ***Mustafikhan Vs. State of Maharashtra*** 2007 (1) Crimes 248 (SC). In N. Bhargavan Pillai (Supra), it was observed that once the entrustment of property is proved, then it is for the accused to prove as to how the property entrusted was dealt with. In the present case the respondent Canara Bank by their letter dated 7th December, 2005 had explained and given their stand on the question how the Kamdhenu Receipts were dealt with. In Mustafikhan (Supra) again it has been observed that once entrustment is admitted by the accused, it is for the accused to discharge burden that entrustment had been carried out as accepted and the obligation had been discharged. In the said case investigation had revealed that the payments were made by the accused to fictitious persons, who were never engaged in work. In the present case as noticed above, the respondent bank has already given their explanation vide their letter dated 7th December, 2005. There is a dispute about the obligations under the OTS,

whether or not the Kamdhenu receipts were to be refunded or paid.

Explanation by the respondent bank is available. This is a civil dispute. In

any case dishonest intention is missing.

10. Keeping in view the aforesaid facts, I do not find any merit in the present petition and the same is dismissed.

SANJIV KHANNA, J

SEPTEMBER 21, 2010

NA