

**SUPREME COURT****Cyril Alfred Rodrigo**

Vs.

**Mohamed Nulair**

*S.C. Appeal No. 54/81 – C.A. Appeal No. 758/76 – M.C. Colombo No. 71*

*Criminal Breach of Trust Penal Code section 389 & 391 ; -- element of entrustment essential in charge of Criminal Breach of Trust against a partner – Who is a partner ? Money received as an accountant or partner.*

The accused respondent was an accountant employed in the firm of Kolberg & Co. On 1.5.66 the accused respondent was admitted as a partner on the following terms (1) He would contribute no capital (2) He would receive an annual sum of Rs. 2000/- as his share of the profits (3) He would not share in the losses (4) He would not be entitled to the goodwill of the firm.

One of the partners, the complainant- Appellant filed a private complaint against the accused charging him with criminal breach of trust of Rs. 59,000/- entrusted to him in his capacity of accountant. The Magistrate convicted the accused respondent for committing the offence of criminal breach of trust simpliciter punishable under section 389 of the Penal Code.

On appeal to the Court of Appeal the conviction was quashed on the grounds that the accused was a partner with limited rights and that in such a case there must be a special agreement showing entrustment.

On appeal to the Supreme Court

- Held* 1. the accused respondent was a partner  
2. there was a doubt whether the accused respondent received the money as an accountant, or as a partner.

## APPEAL from Judgment of Court of Appeal

**Before:** Wanasundera J., Wimalaratne J., & Victor Perera J,  
**Counsel:** A.C. de Zoysa, SAAL with D.T.P. Rajapaksa for Complainant-Appellant.  
V.S.A. Pullenayagam with L. F. Ekanayake, Miss M. Kanapathipillai & Miss D. Wijesundera for Accused-Respondent.

**Argued on:** 1st March, 1982.  
*Cur. adv. vult.*

**Decided on:** 19th March 1982

### WIMALARATNE J.

The firm of Kolberg & Co. commenced business as dealers in patent medicines, acids, chemicals, textiles and a host of other items in about April 1948. The original partners were Fredric Walter Kolberg & Phyllis Edith Kolberg, husband and wife who were German nationals. C.A. Rodrigo who is the Appellant became a partner in January 1953. A.H.M. Nulair who is the accused respondent was employed by the firm as an accountant from 1.9.56. The three partners by indenture P5 attested by a Notary Public agreed to take Nulair into the partnership from 1.5.66 to the extent and in the manner and upon the terms set out in P5 to which all for

were signatories. The limitations on the rights of the new partners were briefly as follows:-

- (a) The new partner was not required to contribute any part of the capital, which was Rs. 247,500/-, whereas the other three contributed Rs. 119,000/-, Rs. 108,500/- and Rs. 20,000/- respectively.
- (b) The profits and losses were to be shared and borne by the three original partners in the proportions of the capital contributed by each.
- (c) Nulair was to continue to draw his salary as accountant and was also to receive as his share of the profits a sum of Rs. 2000/- per year payable at the end of each year. He was to have no interest in the capital assets, and in the goodwill, nor was he to be liable to contribute to the nett losses.
- (d) Any two partners jointly were entitled to operate the Bank account of the firm.
- (e) Clause 13 expressly provided that Nulair "shall not have or exercise any of the rights or powers of a partner in the said firm and shall not engage the credit of the said firm or conduct or interfere in the management of the said business except under the direction of the principal partners or partner."
- (f) The goodwill and the rights to the firm name were to belong to Mr. & Mrs., Kolberg or the survivor of them.

The Kolbergs left Sri Lanka in 1970. On 15.8.73 C.A. Rodrigo instituted a private prosecution in the Magistrate's Court, charging Nulair with having between 1.1.72 and 31.12.72, while being employed in the capacity of a servant, to wit Accountant, Kolberg & Co. committed criminal breach of trust in respect of a sum of Rs. 59,000/- entrusted to him in his capacity as such servant, an offence punishable under section 391 of the Penal Code.

At the trial Rodrigo gave evidence and called a representative of the firm of Alles, Martin & Co. to speak to the accounts of Kolberg & Co. for 1972. A letter P1 dated 24.5.73, written by the accused to Rodrigo was also produced. It disclosed the fact that the accused had taken for his own use money belonging to the firm. The defence was that the shortage of Rs. 59,000/- was as a result of monies of the firm being handed over to a Mr. White to be remitted to Mr.

Kolberg who was abroad. He explained that he wrote P1 as a result of being compelled to do so by Rodrigo. The learned Magistrate convicted the accused of having committed the offence of criminal breach of trust simpliciter, punishable under 389 of the Penal Code and sentenced him to a term of 18 months R.I. and a fine of Rs. 1,500/-

The Court of Appeal set aside that conviction and sentence for the reason that when a person is in the position of a partner a charge of criminal breach of trust cannot succeed against him unless on the basis of some special agreement showing entrustment. The Court has taken the view that the accused was a partner with limited rights, principally because in P5 the other three partners had recognised him as a partner and also because the Business Names Register P4 gave his name as a partner. Another factor which had influenced the Court was that the Magistrate had not convicted the accused on the basis that he was a servant, but that he was guilty of criminal breach of trust simpliciter. In coming to this conclusion the Court of Appeal has been guided by a judgment of the Supreme Court of India, in the case of *Patel Vs. The State of Maharashtra* (1965) 2 Cr. L.J. 431 in terms of which where a partner is authorised to recover dues of the partnership and spend monies in the business of the partnership he cannot be guilty of criminal breach of trust even in respect of the monies realised by him, because the offence of criminal breach of trust rests principally on the element of entrustment, but a partner has dominium over the partnership property by law and not by entrustment.

The correctness of the principle in *Patel's case* is not challenged by learned counsel for the complainant-appellant. His contention is that on a true appreciation of the documentary evidence, especially P5, and the conduct of the parties, Nulair was never considered a partner by the other three partners. He was only a paid accountant, and the partnership property was entrusted to him in that capacity. Learned Counsel for the accused respondent referred specifically to the designation of the accused as a partner in P5 and the other documents, and to the fact that the accused was entitled to share in the profits, although the amount was limited to a fixed sum of Rs. 2,000/- per year. He also relied on the principle that a partner cannot be employed by his firm, for a man cannot be his own employer — *Lindley on Partnership* (13th Ed) 26.

It is significant that Rodrigo did not produce P5 until it was shown to him towards the end of his cross examination. He presented his whole case on the footing that the accused's relationship with the firm was only that of an accountant. When confronted with P5 he admitted that the accused was considered as a partner by the others, and that after the Kolbergs left Sri Lanka in 1970 cheques were signed by himself and the accused. That is to say clause II of the agreement was acted upon. The evidence of Rodrigo also established the fact that the accused was actively engaged in the business of the firm: that could have only been possible if he was given directions by one of the other partners in terms of clause 13.

Our law of Partnership is the English Law. Under the English Partnership Act of 1890 a partnership is the relation which subsists between persons carrying on a business in common with a view to profit. A partner would then be a person who has entered into this relation of partnership. The rights and obligations of partners inter se, are generally regulated, to a certain extent, by special agreement, the true meaning of which is to be ascertained from the contents of the written instrument. The conduct of the parties is also relevant, besides the written agreement, in order to ascertain the relationship between the parties. Now, the ordinary principles applicable to the proof of criminal charges would be applicable where a charge of breach of trust is brought against a partner or employee. The burden is on the prosecution to establish beyond reasonable doubt that the accused was an employee and not a partner and that he received the money in the capacity of an employee and not in the capacity of a partner. The benefit of any doubt on any of these matters has to be resolved in favour of the accused.

Contribution towards the capital of a business is not essential to make a person a partner. He may instead contribute his skill and experience. In this case the accused did not contribute towards the capital. But the evidence disclosed his activity in the management of the business.

Section 24(5) of the Partnership Act declares that every partner may take part in the management of the business. But it is competent for the parties to agree that the management of the partnership affairs be conferred on one or more of their numbers. The inclusion of clause 13 in P5 is therefore a recognition by other partners of Nulair also as a partner.

There is the fact that the accused's share of the profits was a fixed sum, namely Rs. 2,000/- per year, and not in proportion to the profits of the business. In this connection, *Lindley* says, under the sub-head "Salaried" partner, "In the case of junior partners, it is not unusual to express their share of the profits in the form of a fixed salary" (page 437).

A consideration of all the terms of the written agreement P5 as well as the evidence relating to the conduct of the parties creates a doubt as to whether the accused received the money he is alleged to have misappropriated in his capacity as accountant or as a partner with limited rights. The Court of Appeal was therefore right in acquitting the accused. This Appeal is dismissed, but without costs.

Wanasundera J: — I agree.

Victor Perera J: — I agree.

*Appeal dismissed.*