

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 29 OF 2013**

Shri Prabhat T. B.

UDC, Passport Office, Patto,

Panjim Goa, R/o. Otr. No-4/C-1

Passport Bhavan, Patto Panjim Goa

P/Address:

s/o Shri Bhaskar Rao,

“Asha” Nivas”, Maradu P.O.,

Cochin-682304, Kerala.

... Appellant

Versus

STATE (Through)

Central Bureau of Investigation,

The Officer In Charge

Office of the Suptd. of Police, CBI,

Anti-Corruption Branch,

Bungalow No.F-1, Type-VI,

GMC Quarters, National Highway NH-17,

Bambolim, Goa – 403202.

... Respondent

Mr. S. S. Kantak, Senior Advocate along with Mr. Rohan Desai and
Mr. A. Gosavi, Advocates for the Appellant.

Mr. M. Amonkar, Public Prosecutor for the State (CBI).

Coram:- M. S. SONAK, J.

Dated:- 8th October, 2020

ORAL JUDGMENT:

Heard Mr. S. S. Kantak, learned Senior Advocate who appears along with Mr. Rohan Desai and Mr. A. Gosavi for the Appellant and Mr. M. Amonkar, learned Public Prosecutor for the State (CBI).

2. The appellant challenges the judgment and order dated 15.03.2013 made by the learned Special Judge, North Goa at Panaji in Special Criminal Case No.7/2005 convicting the appellant for the offence under Section 13(1)(c) of the Prevention of Corruption Act, 1988 (said Act) and sentencing him to undergo Rigorous Imprisonment for a period of one year, pay fine of ₹500/- and in default to undergo simple imprisonment for seven days. By the same judgment and order however, the appellant, came to be acquitted of offence under Section 13(1)(d) of the said Act as well as Section 420 of the Indian Penal Code (IPC).

3. In this case, the Special Judge, on 04.07.2008, framed the following charge against the appellant:

“

CHARGE

I, Shri U. V. Bakre, Special Judge, Panaji, hereby charge you Shri Prabhat T. B. as follows:-

That you while functioning as Upper Division Clerk (In-charge Cashier) for the period from 9.11.2000 to 5.1.2005 at Passport Office, Panaji-Goa, abused your official position by illegal and corrupt means and obtained the proceeds of scooter

advance of Rs.27,600/- and used the same for some other purpose and did not effect any deduction from your salary towards the recovery of the said conveyance advance and thereby fraudulently and dishonestly misappropriated the Government amount of Rs.38,916/- including interest and further you also availed of leave travel concession advance of Rs.10,000/- from the Passport office, Panaji-Goa without performing any journey as claimed and thereby cheated the Government ex-chequer by way of fraudulent claim and thereby you have committed the offence punishable under section 420 of Indian Penal Code and under Section 13(2) read with 13(1)(c) and (d) of the Prevention of Corruption Act, 1988 and within my cognizance.

And I hereby direct that you be tried on the said charges.

Given under my hand and the seal of this court on this the 4th day of July, 2008.”

4. Mr. Kantak, learned Senior Advocate for the appellant submits that from the nature of the charge framed against the appellant, it is very apparent that even the prosecution, has not come out with the case that there was any entrustment of property as such in favour of the appellant. He submits that even otherwise the evidence on record, does not make out any case of entrustment of any property as such to the appellant.

5. Mr. Kantak submits that at the highest, this is the case where a conveyance loan was granted to the appellant and the appellant, may have made certain defaults in the matter of repayment of the same. Mr. Kantak submits that in such circumstances, the provisions of the

said Act are not at all attracted and, in any case, the ingredients of the offence under Section 13(1)(c) of the said Act cannot be said to have been made out. He relies on the decision of the Hon'ble Supreme Court in *Satishchandra Shah v. State of Gujarat – (2019) 9 SCC 148* and of the Allahabad High Court in *State v. Tirath Das – AIR 1954 ALL 583* in support of his contentions.

6. Mr. Kantak, submits that in the alternate and without prejudice to the aforesaid, at the highest, the prosecution, can be said to have made out a case under Section 403 of IPC. He submits that in an appeal against conviction, the appellate court is entitled to proceed under the Section in respect of which the charge has not been invoked by the prosecution against the accused, when, from the facts available on the record, it could be concluded that instead of Section under which the accused is charged, offence under some other section are made out, provided, while doing so, no prejudice is caused to the accused. He relies on *Rajendra Singh and another v. State of Uttar Pradesh – AIR 1960 All 387* and the decision of the Hon'ble Supreme Court in the case of *Mala Singh & Ors. v. State of Haryana – (2019) 5 SCC 127*.

7. Mr. Kantak points out that written submissions have been filed in this matter on 23.09.2020 and additional written submissions on 01.10.2020. He submits that these written submissions may be taken into consideration for the purpose of deciding this appeal.

8. Mr. Amonkar, learned Public Prosecutor points out that in this case there is no dispute whatsoever that the appellant was a public servant. He submits that in such a situation the offence under Section 13(1)(c) of the said Act is clearly made out because this loan amount, was entrusted to the appellant for purchase of a conveyance and, the appellant, went to the extent of denying that he ever received this loan or in any case, failed to use this loan for the purpose for which he obtained the same. Mr. Amonkar points out that the learned Special Judge has already been lenient to the appellant and has in fact imposed the minimum prescribed penalty and, therefore, this appeal may be dismissed.

9. In order to appreciate the rival contentions, at the outset, reference is necessary to the provisions of Section 13(1) of the said Act as they prevailed during the relevant period, which are quoted below:

“13. Criminal misconduct by a public servant.-(1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be

likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

Explanation. - For the purposes of this section "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

10. In this case, as noticed earlier, the charge was framed on 04.07.2008. In the charge, it is alleged that the appellant abused his official position and by illegal and corrupt means obtained the proceeds of scooter advance of ₹27,600/-. However, upon analyzing the evidence on record, the learned Special Judge has acquitted the appellant for the offence under Section 13(1)(d) of the said Act which *inter alia* relates to a public servant, by corrupt or illegal means, obtaining for himself or any other person any valuable thing or pecuniary advantage, or by abusing his position as public servant obtains for himself or for any other person valuable thing or pecuniary advantage, or while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

11. The learned Special Judge has reasoned at paras 82 and 83 of the impugned order that the appellant, was in fact entitled for a conveyance allowance. There was no evidence on record to prove that he had availed to this advance by any corrupt or illegal means or by abusing his position as public servant. Therefore, the learned Special Judge concluded that the fact that the appellant had availed a scooter advance would not *per se* constitute any offence under Section 13(1)(d) of the said Act. The State, has not appealed against the acquittal of the appellant under Section 13(1)(d) of the said Act.

12. Similarly, the Special Judge in this case, has also acquitted the

appellant for the offence of cheating punishable under Section 420 of the IPC by reasoning in para 84 of the impugned order that the prosecution had failed to establish that the appellant by deceiving any person cheated and thereby dishonestly or fraudulently induced the person deceived to deliver any property. Again, the acquittal of the appellant under Section 420 of the IPC has not been questioned by the State.

13. The question, which therefore arises for determination is whether the prosecution in this case, has established the ingredients of the offence under Section 13(1)(c) of the said Act. Section 13(1)(c) of the said Act provides that if a public servant dishonestly or fraudulently misappropriates or otherwise converts for his own use any property “entrusted to him” or under his control as a public servant or allows any other person to do so, then, he can be convicted and punished under Section 13(1)(c) of the said Act. Therefore, the entrustment of property, appears to be one of the essential ingredients under Section 13(1)(c) of the said Act.

14. From the manner in which the charge was framed in this matter, it is possible to hold that it was not even the case of the prosecution that the loan amount of ₹27,600/- was entrusted to the appellant. This loan amount may have been advanced by the department to the appellant. This loan amount may have been given by the department to the appellant. However, mere advance of such

amount or the giving of such amount, cannot, in all cases, qualify to be styled as entrustment of the amount.

15. Mr. Kantak pointed out that the provisions of Section 405 of IPC and Section 13(1)(c) of the said Act are to a great extent, similar in their content except that Section 13(1)(c) of the said Act applies only in cases of public servants. He points out that in order to establish the offence of criminal breach of trust under Section 405 of IPC, entrustment of the property to the accused is an essential ingredient. He therefore submits that unless there is clear evidence of entrustment, there is no question of any conviction under Section 13(1)(c) of the said Act.

16. In support of his contentions Mr. Kantak referred to the decision of the Hon'ble Apex Court in the case of *Satishchandra Shah (supra)*. In this case, the Hon'ble Apex Court was concerned with a dispute which arose out of a loan transaction between the parties and the question was whether the accused should have been convicted under Sections 405 and 406 of the IPC. The Hon'ble Apex Court observed that it fell from the record that the respondent no.2 knew the appellant and attendant circumstances before lending the loan. Further, it was an admitted fact that in order to recover the loan amount, the respondent no.2 had instituted Summary Civil Suit which was pending adjudication. Then the Hon'ble Apex Court went on to observe that the law clearly recognizes the difference between simple

payment/investment of money and entrustment of money or property. A mere breach of promise, agreement or contract does not, *ipso facto*, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment.

17. The Hon'ble Apex Court in para 12 further observed that there is nothing, either in the complaint or in the material before the court, pointing to the fact that any property was entrusted to the appellant at all which he dishonestly converted for his own use so as to satisfy the ingredients of Section 405 punishable under Section 406 of IPC. Hence, the Hon'ble Apex Court concluded that the learned Magistrate committed a serious error in issuing process against the appellant for the said offence.

18. Similarly, Mr. Kantak placed reliance upon the decision in *Tirath Das (supra)*, where, the Hon'ble Apex Court, was also concerned with the loan transaction. In that context, the High Court observed that the one underlying idea in Section 405 is undoubtedly this that the property which is the subject-matter of entrustment, or in respect of which dominion is passed over to the accused, does not even for the time being, become the property of the accused which he could use for his own purposes. The creation of the trust or the passing of dominion over certain property implies that the person to whom property is handed over does not become the beneficial owner thereof even for the time that the property is not to be used according to the

directions given at the time of entrustment of the property. Thus, the section does not cover the case of a loan or of an advance of money when the borrower or the depositor intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof.

19. Applying the aforesaid principles to the facts and circumstances of the present case and also taking cognizance of the manner in which the charge was framed in this case, it is possible to hold that in this case, there was no entrustment as such of the loan amount to the appellant. If, such a view, is a possible view, then, having regard to the jurisprudence in criminal matters it will perhaps be necessary to give the benefit of such view to the appellant and upset the conviction under Section 13(1)(c) of the said Act in the absence of clear evidence on the issue of entrustment.

20. However, the matter, cannot rest here. The evidence on record indicates that something could have been said about the manner in which the appellant in this case, obtained loan from the department. Admittedly, the appellant, was working in the Passport Department as Upper Division Clerk and an in-charge cashier. After the loan was obtained, there were no clear entries made in the registers as a result of which, it was extremely difficult for anyone to detect whether such

loan had indeed been advanced and availed by the appellant. On the basis of this confusion of his doing as also his position as an in-charge cashier, for a period of almost three years or so, the appellant, neither bothered to purchase any conveyance (scooter) nor bothered to repay any instalments towards repayment of this loan amount.

21. Ultimately, one of the assistants (PW4) in the cash department discovered that no deductions were being made from the salary of the appellant and this lead to further investigations during the course of which, it was discovered that not only such loan had been taken by the appellant but further, for the period of over three years, the appellant had neither bothered to purchase any scooter nor pay any instalments towards the repayment of such loan.

22. The evidence on record, according to me, very clearly makes out a case of dishonest misappropriation of property, which is an offence in terms of Section 403 of IPC. For this offence, entrustment of the amount, is not an essential ingredient. In fact, Section 403 of IPC provides that whoever dishonestly mis-appropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. The Explanation 1 to Section 403 provides that a dishonest misappropriation for a time only is a misappropriation with the meaning of this section.

23. According to me, the evidence on record, very clearly makes out a case of an offence under Section 403 of IPC. In fact, the evidence on record, proves beyond reasonable doubt, that the appellant, in this case, has committed offence under Section 403 of IPC and is accordingly required to be punished for the same.

24. In *Mala Singh (supra)*, the Hon'ble Supreme Court has held that a combined reading of Sections 216, 386 and 464 Cr.PC would reveal that an alteration of charge where no prejudice is caused to the accused or the prosecution is well within the powers and the jurisdiction of the court including the appellate court. In other words, it is only when any omission to frame the charge initially or till culmination of the proceedings or at the appellate stage results in failure of justice or causes prejudice, the same may result in vitiating the trial in appropriate case.

25. The Hon'ble Supreme Court in *Mala Singh (supra)*, has referred to the decision of the constitution bench in ***Willie (William) Slaney v. State of Madhya Pradesh - AIR 1956 SC 116***, wherein, the constitution bench, speaking through Justice Vivian Bose, in his limitable style of writing, held that when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact: (1) the accused has "in fact" been misled by it "and" (2) it has occasioned a failure of justice.

26. Similarly, in *Kantilal Mehta v. State of Maharashtra – (1969) 3 SCC 166*, the Hon'ble Supreme Court once addressed this issue by examining the scheme of the Code and held that the Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defense open to him, on the charge finally preferred against him.

27. According to me, in the facts and circumstances of the present case, and having regard to the law laid down by the Hon'ble Supreme Court in the aforesaid decisions, the interest of justice will be met if, the conviction of the appellant, under Section 13(1)(c) of the said Act is substituted with his conviction under Section 403 of IPC. In this case, there is absolutely no case of any prejudice to the appellant because, the charge, very clearly indicated that the appellant, was in fact, being accused of the offence under Section 403 of IPC. In any case, even assuming, that there was some omission in the framing of the charge, the evidence led by the prosecution, clearly made out the ingredient of Section 403 of IPC. The appellant, in this case, has extensively cross-examined the witnesses and from the nature of the cross-examination, there is absolutely no scope to hold that the appellant, was in any manner misled or prejudiced.

28. Therefore, advisedly, the alternate contention was raised on behalf of the appellant in this matter, though, without prejudice to the basic contention that the appellant was entitled to a clean acquittal in this matter. To be fair, learned Senior Advocate, on the basis of instructions, had already made it clear that the appellant was not interested in seeking any reversal of the order of dismissal imposed upon him by the department and that the main purpose for prosecuting this appeal was not only to clear the name of the appellant, but also, because any incarceration of the appellant, at this stage, would really not be in the interest of justice. Mr. Kantak pointed out that the learned Special Judge, in the impugned judgment and order, which was delivered way back in the year 2013, had taken cognizance of the fact that the appellant at that stage, was 58 years of age and was suffering from idiopathic epilepsy. Mr. Kantak pointed out that today, the appellant is 65 years of age and there is further deterioration insofar as his health is concerned.

29. Taking into consideration all the aforesaid circumstances, this is a fit case where, the appellant's conviction under Section 13(1)(c) of the said Act is liable to be set aside and the same is liable to be substituted with the conviction under Section 403 of IPC. Insofar as the issue of sentencing is concerned, taking into consideration the age of the appellant, the condition of his health and also the circumstance that the appellant ultimately repaid the loan amount together with penal interest, the punishment of imprisonment does not seem to be

appropriate. Besides, the record indicates that the appellant has already been dismissed from service and there are some issues relating to his terminal benefits also pending. Upon the cumulative consideration of all these circumstances, rather than impose a punishment of imprisonment, the ends of justice will be met if, the appellant, is required to pay a fine of ₹50,000/- and in default to undergo Simple Imprisonment of three months.

30. Mr. Kantak, on instructions, states that this fine amount will be deposited in this Court within a period of one month from today. In case, the fine amount is not deposited within one month from today, then, the Registry/Special Court to take steps to apprehend the appellant for serving the in-default sentence.

31. If, the fine amount is indeed deposited, then, the learned counsel for the parties fairly agree, that this amount may be made over to the “Goa State Covid-19 Relief Fund” or some such government fund which is dedicated to the cause of treating poor patients afflicted with Covid-19.

32. The appeal is accordingly disposed of in the aforesaid terms. There shall be no order as to costs.

M. S. SONAK, J.