Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

Present : **The Hon'ble Mr. Justice Bibek Chaudhuri**

CRA 296 of 1992

Gulin Chandra Hansda
-Vs.-
State of West Bengal

For the appellants : Mr. Mahendra Prasad Gupta, Adv.
Mr. Mukunda Lal Sarkar, Adv.,
Ms. Antara Panja, Adv.

For the respondent : Mr. Saswata Gopal Mukherjee, Adv.,
Ms. Faria Hossain, Adv.

Heard on : 15.11.2021, 16.11.2021

Judgment on : 16.11.2021.

Bibek Chaudhuri, J.:

Judgment and order of conviction and sentence dated 31st August, 1992 passed by the learned Judge, 5th Special Court, Contai, Midnapore in Special Trial Case No. 34 of 1990 convicting the appellant and sentencing him for committing offence under Section 409 of the Indian Penal Code to suffer rigorous imprisonment for two years is under challenge in the instant appeal. Before I dwell upon the submissions made by the respective Counsels for the appellant and the respondent it is necessary to narrate the facts of the case in short compass.

The appellant was an Extra Departmental Branch Postmaster (EDBPM), Kodapara Branch Post Office, Midnapore within Police Station – Belpahari. As Postmaster, he received certain amount of money for deposit in Savings Bank Account No. 556756 standing in the name of one Gobordhan Tudu. Similarly, one Malati Soren was savings bank account holder bearing no. 556851 maintained in the said Post Office. She also deposited certain amount of money on 5th November, 1986. One Smt. Rani Murmu was also the holder of Savings Bank Account No. 557135. She also deposited certain amount of money on 27th May, 1986 in her passbook. The appellant received the said money from the above-named savings bank account holders, entered the said deposit in their passbooks with official seal and signature and returned the passbooks to the above-named account holders. However, on departmental enquiry it was learnt that the said Postmaster never entered the money so deposited by the savings bank account holders in the ledger book and other official registers and documents and the said deposits were not made over to the Government account. In view of such specific act and omission made by the appellant, one Sunil Baran Mukherjee, Sub-Divisional Inspector of Post Offices lodged a complaint before the Officer-in-Charge, Belpahari Police Station on 1st July, 1988 on the basis of which Belpahari Police Station Case No. 1 dated 1st July, 1988 under Section 409 of the Indian Penal Code was registered against the appellant.

Investigation of the case was conducted by the Police Authority and on completion of investigation charge-sheet was submitted under Section 409 of the Indian Penal Code. Since the offence under Section 409 of the Indian Penal Code is triable by the Special Court the case was sent to the Court of the learned Special Judge, 5th Court at Contai, Midnapore for trial. It appears from the record that the accused duly entered appearance before the Trial Court. Charge was framed against the accused under Section 409 of the Indian Penal Code and when the said charge was read over and explained to him, he pleaded not guilty. Accordingly, trial of this case commenced.

During trial, prosecution examined as many as ten witnesses. Series of documents were marked exhibits. The appellant/accused was examined under Section 313 of the Code of Criminal Procedure. It was the specific defence of the accused that he did not misappropriate any money of any of the account holders. He made payment to the account holders from their savings whenever they came to withdraw the amount. However, he failed to incorporate some of the deposits made by some of the account holders in the Post Office ledger book and the Government account book as he was mentally perplexed at the relevant period of time because of serious illness of his wife.

The learned Trial Judge on careful consideration of entire evidence on record both oral and documentary as well as the answers given by the appellant in course of his examination under Section 313 of the Code of Criminal Procedure held the accused guilty for committing offence under Section 409 of the Indian Penal Code and convicted and sentenced him accordingly.

As a Court of appeal it is the duty of this Court to examine the evidence on record independently. It is also the duty of the Court to consider whether the learned Court below has committed any illegality in the application of legal principles involved in the case.

I have already recorded that the prosecution examined ten witnesses during trial of the case. Amongst the said witnesses, P. W. 1, Sunil Kumar Banerjee was the Sub-Divisional Inspector of Post Offices, Jhargram Sub-division who made departmental enquiry in the said Branch Post Office during 1986-87. After enquiry he found certain discrepancies in the matter of receiving money in respect of savings bank account holders and transmitting the same to the Government account. He informed the matter to his superior officer and subsequently submitted FIR against the appellant on 1ST July, 1988. P.W. 2, Vivekananda Adhikary was the Assistant Superintendent of Post Offices, Midnapore Sub-Division during the year 1990. From his possession the passbooks of Gobardhan Tudu, Malati Soren and Rani Murmu were seized by the Investigating Officer under a seizure list. P.W. 3, Ranjit Kumar Das was posted as the Office Assistant attached to the office of the Senior Superintendent of Post Offices, Midnapore in the year 1990. On 28th November, 1990, the Investigating Officer seized two passbooks of savings account bearing No.556851, standing in the name of Mrs.Malati Soren and bearing No.557135, standing in the name of Smt. Rani Murmu from the office of the

Senior Superintendent, Midnapore Division under a seizure list in his presence. He put his signature on the seizure list. His signature was marked as Exbts.3 in course of his evidence. Similarly, P.W.4, Tarun Kanti Ray was posted as Office Assistant in the office of the Senior Superintendent, Midnapur Division on 28th November, 1990. He is also a seizure witness whose signature on the seizure list was marked as Exhibit 3/2. P.W.5, Smt. Rani Murmu, P.W.6, Smt. Maloti Soren and P.W.7, Gobordhan Tudu were the savings bank holders in question in the said post office. P.W.8, S.I., S.Ansari is the Investigating Officer of this case. During investigation he seized the passbooks of Gobordhan Tudu, Malati Soren and Rani Murmu. He also seized the Cash Register, 8 withdrawal slips submitted by the account holders on different dates and post office accounts ledger during his investigation.

P.W.9 is the Recording Officer of the police station case and P.W.10 is the subsequent Investigating Officer who submitted charge-sheet against the accused.

Mr.Mahendra Prasad Gupta, learned Advocate for the appellant at the outset submits that the learned Trial Judge passed the impugned judgment holding the appellant guilty for committing offence under Section 409 of the Indian Penal Code and convicting and sentencing him accordingly without considering any evidence on record only on the basis of the statement made by the accused under Section 313 of the Code of Criminal Procedure. It is submitted by Mr. Gupta that answers of the accused to the question under Section 313 of the Code of Criminal Procedure is not a substantive piece of evidence. Therefore, the answers cannot be used to convict an accused without any substantive corroboration in the evidence on record. In support of his contention, he first refers to the decision of the Hon'ble Supreme Court in the case of ***Reena Hazarika Vs. State of Assam : (2019) 13 SCC 289***. In Paragraph 19 of the said report, the scope of Section 313 of the Code of Criminal Procedure is stated in the following words: -

"19. Section 313 Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) Cr.P.C. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty-bound under Section 313(4)

Cr.P.C. to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing."

It was further observed in Paragraph 20 of the said judgment that neither Trial Court nor the High Court took notice of the defence taken by the appellant while examined under Section 313 of the Code of Criminal Procedure to either accept or reject it. The Hon'ble Supreme Court was of the opinion that the defence taken by the accused in course of his examination under Section 313 of the Code of Criminal Procedure cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and nature and other evidence available. The complete non-consideration thereof would cause prejudice to the appellant.

Mr.Gupta next refers to another case of the Hon'ble Supreme Court reported in ***(2013) 12 SCC 406: Sujit Biswas Vs. State of Assam***. In the aforesaid report, the Hon'ble Supreme Court reiterated the age-old principle on examination of an accused under Section 313 of the Code of Criminal Procedure. It is observed by the Apex Court that the purpose of examining the accused person under Section 313 is to meet the requirements of the principle of natural justice, i.e., *audi alteram partem*. The accused must be asked to furnish some explanation as regards the incriminating circumstances associated with him and the Court must take note of such explanation. It is further held by the Hon'ble Supreme Court in the aforesaid report that in case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is completed, meaning thereby if there is a missing link in the chain of circumstances and the said missing link is available from the answer given by the accused under Section 313 of the Code of Criminal Procedure, the said missing link can be used to complete the chain of circumstances who hold the accused guilty for committing offence.

Mr. Gupta next refers to the decision of the Hon'ble Supreme Court in the case of ***Nagaraj Vs. State*** reported in ***(2015) 4 SCC***

739; Paragraph 15 of the said report is relevant for the purpose of this case and reproduce below:-

*"**15**. In the context of this aspect of the law it has been held by this Court in **Parsuram Pandey v. State of Bihar** that Section 313 Cr.P.C. is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice, i.e., audi alteram partem, as explained in **Asraf Ali v. State of Assam**. In **Sher Singh v. State of Haryana** this Court has recently clarified that because of the language implied in Section 304-B IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304-B IPC that an accused must furnish credible evidence which is indicative of his innocence, either under Section 313 Cr.P.C. or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an*

evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the accused because of what he has stated or what he has failed to state in his examination under Section 313 Cr.P.C."

With reference to the above-mentioned reports, it is submitted by Mr. Gupta that examination of the accused under Section 313 of the Code of Criminal Procedure is to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused and not to nail the accused in order to hold him guilty. In the instant case, the learned Trial Judge held the accused guilty for committing offence under Section 409 of the Indian Penal Code on the basis of admission made in course of examination under Section 313 of the Code of Criminal Procedure which is not permissible under the law. It is further submitted by Mr. Gupta that in criminal trial prosecution must prove its case beyond any shadow of doubt and conviction can be based on the basis of such evidence adduced by the prosecution. An explanation under Section 313 of the Code of Criminal Procedure made by the accused cannot be basis of conviction of the accused.

Secondly, Mr. Gupta submits that P.W.5, P.W.6 and P.W.7 are the persons whose money was not deposited in Government account allegedly by the accused. However, P.W.5, P.W.6 and P.W.7 did not make any allegation against the accused in course of their evidence. On the contrary, they stated on oath that they received entire amount with interest from the post office, which was deposited by them in their saving bank accounts. In view of such evidence of the account holders who may be treated as the victims of the case, the accused/appellant cannot be held responsible for misappropriation of money. The order of conviction and sentence passed against the appellant is bad in law and liable to be set aside.

Mr. Gupta concludes his argument submitting that for constituting an offence of criminal breach of trust, the following ingredients must be satisfied:-

(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property or wilfully suffers any other person to do so;

(c) that such misappropriation, conversation, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged; or of any legal contract which the person has made, touching the discharge of such trust.

In the instant case, the appellant was entrusted to receive the saving bank deposits from the P.W.5, P.W.6 and P.W.7. He duly received the amount on different dates; entered the same in the postal savings books; whenever the saving bank accounts holders came to withdraw the money, the accused paid that amount. Therefore, by way of legal fiction the trust that was created by the saving bank account holders in favour of the Postmaster, was duly discharged by him and the account holders had no allegation. In support of his contention, he refers to a decision of the Hon'ble Supreme Court in ***Asoke Basak Vs. State of Maharashtra & Ors.*** reported in ***(2010) 10 SCC 660***.

Mr. Gupta also refers ***Kailash Kumar Sanwata Vs. State of Bihar & Anr.*** reported in ***(2003) 7 SCC 399***. I have gone through the said decision and found that the facts of the said reported decision are in no way connected with the facts of this case and, therefore, I refrain myself from recording the principle laid down in the said judgment.

Ms. Faria Hossain, learned Public Prosecutor-in-Charge, on the other hand, submits that a case under Section 409 of the Indian Penal Code may entirely be based on documentary evidence. It is further submitted by her that one of the basic canons of Evidence Act is that the oral evidence may be subject to scrutiny as to whether a witness deposed falsely or not but a document shall never be questioned on the point of authenticity. She also adds that the documents involved in the instant case are all government records and the said documents are required to be maintained by the Postmaster under Postmaster's Manual published by the Department of Post, Government of India in course of his official business.

Ms. Hossain next distinguishes judgments of the Hon'ble Supreme Court referred to by Mr. Gupta. It is submitted by her that in all the above-mentioned reported decisions, it was observed by the Hon'ble Supreme Court that examination of the accused under Section 313 of the Code of Criminal Procedure confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right of *audi alteram partem* as a constitutional right to a fair trial under Article 21 of the Constitution of India. It is further stated by Ms. Hossain that the Hon'ble Supreme Court further held that in case based on circumstantial evidence, answer given by the accused in course of his examination under Section 313 of the Code of Criminal Procedure can be taken as a missing link to complete the chain of circumstances. Therefore, it is not the law enunciated by the Hon'ble Supreme Court that the examination of the accused under Section 313 of the Criminal Procedure Code is a mere formality or to follow the principle of natural justice, i.e. *audi alteram partem*. The answers of the examination under Section 313 of the Code of Criminal Procedure can well be taken also in certain circumstances to complete the chain of circumstantial evidence pointing towards the guilt of the accused.

Ms. Hossain next draws my attention to the evidence of the *de facto* complainant, Sunil Kumar Mukherjee. It is ascertained from his evidence that he was posted as Sub-Divisional Inspector of Post Offices, Jhargram Sub-Division during the period 1986-1987. At the relevant point of time he inspected Kodapara Branch Post Office. The accused was extra departmental branch Postmaster in the said post office. As Postmaster he used to receive money for depositing in savings bank accounts from the account holders. It was also his duty to enter the same in the passbook and the corresponding savings bank journals and branch office account book. He is responsible for the cash of the branch post office. During enquiry on 12th April, 1988 P.W.1 found that in respect of Savings Bank Account No.556756, Sri Gobordhan Tudu deposited Rs.6,500/- during the period between 21st December, 1984 to 13th July, 1987. The said depositor withdrew a sum of Rs.2,000/- on different dates during the period between 30th January, 1986 to 26th August, 1987. The accused entered the deposits in the savings bank passbook and the withdrawal in the savings bank accounts of the said Gobordhan Tudu but those were not entered in the savings bank journal of the branch post office or in savings bank account book. Thus, the amount of Rs.6,500/- was not deposited in the Government account meaning thereby the accused defalcated the said amount. Again he made payment of Rs.2,000/- out of the said defalcated amount. P.W.1 produced and proved the passbook of the said Gobordhan Tudu and corresponding journal and the account book to show that the said amounts were not entered in the journal and the account book and, therefore, the said money was not deposited to the Government treasury. Similar was the case in respect of savings bank passbook No.556851 and 557135. It is also ascertained from his evidence that after inspection of the said branch post office on 12th April, 1988, he informed the matter to the senior superintendent of post offices at Midnapore and the senior superintendent of post offices with P.W.1 had inspected the said branch post office again on 23rd July, 1988. Thereafter, he submitted the F.I.R.

The accused in course of examination under Section 313 of the Code of Criminal Procedure admitted that he did not enter the said deposits and withdrawals in the post office accounts journal and account book. He admitted that said amount was not deposited in the Government account. Thus, the said amount was lying in the hand of the accused. The aforesaid documents prove beyond doubt the involvement of the accused in misappropriating the amount. The learned trial Judge used the reply of the accused under Section 313 of the Code of Criminal Procedure as additional circumstance to prove the guilt. Therefore, the learned trial Judge acted within the four corners of the legal principles enunciated by the Hon'ble Supreme Court in dealing with the answers to the questions made under Section 313 of the Code of Criminal Procedure.

It is further submitted by Ms. Hossain that the accused subsequently paid the entire defalcated amount to the Government account. This goes to suggest that he defalcated the amount because defalcation or misappropriation of money even for a short period of time is enough for the Court to hold the accused guilty for committing offence under Section 409 of the Indian Penal Code and subsequent payment does not absolve his responsibility.

Having heard the learned counsel for the parties and on careful perusal of the entire evidence on record as well as reported decisions cited by Mr. Gupta, I like to record at the outset that in order to sustain conviction under Section 409 of the Indian Penal Code, two ingredients are to be proved. The ingredients are:

The accused, a public servant, or banker or agent was entrusted with property for which he is duty bound to act for; and,

the accused has committed criminal breach of trust.

What amounts to criminal breach trust is provided in Section 405 of Indian Penal Code. The basic requirements to bring home the acquisitions under Section 405 are the requirements to prove conjointly (a) entrustment, and (b) whether the accused was actuated by dishonest intention or not; misappropriated it or converted it to his own use to the detriment of the persons who entrusted. As the question of intention is not a matter of direct proof, certain broad decisions are envisaged which would generally afford useful guidelines in deciding whether in a particular case the accused had *mens ria* for the crime.

Bearing the statutory provision in mind let us consider the case in hand on the basis of evidence on record. Indisputably P.W.5, P.W.6 and P.W.7 were the savings bank account holders with branch post office where the appellant was part time . As it was the duty of the appellant to receive money which the account holders deposit, enter the deposits in the account books, post office journal and the Government account and dispatch the amount to the Government head, in the instant case, the accused received the money, entered the same in the passbook but did not enter the said deposits in the post office journal and the Government ledger. Thus, he failed to dispatch the said amount to the Government accounts. The money was kept in his custody. The said fact was proved by P.W.1 on production of documents. In course of evidence under Section 313 of the Code of Criminal Procedure the appellant admitted the said fact. The plea was taken that at the relevant point of time his wife was seriously ill. So, he was mentally perplexed and failed to record the said deposits in the Government accounts. It is not the case of the defence that only three persons (P.W.5, P.W.6 and P.W.7) used to maintain savings bank account in the said post office. In respect of other bank accounts the appellant entered the said deposits to various departmental account books and dispatched the amount to the Government head. Only in respect of these three accounts the accused failed and such failure circumstantially proves his *mens ria* to commit the offence.

In view of such circumstances and for the reasons stated above, I do not find any reason to spill ink over the judgment and order of conviction and sentence passed by the learned trial Judge.

The instant appeal is, therefore, **dismissed** on contest, however, without costs.

The appellant is directed to surrender before the trial Court within three weeks from the date of communication of this judgment failing which the learned trial Judge is at liberty to issue warrant of arrest against the appellant.

The parties are at liberty to act on the server copy of the judgement.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

Srimanta/Mithun/Suman
A.Rs. (Court)