

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

Present :

The Hon'ble Justice Bibek Chaudhuri

CRA 301 of 2015

**Rajendra Kumar Ghimiray
-Vs.-
State of West Bengal**

For the appellant : Mr. Biplab Mitra, Adv.,
Ms. Trina Mitra, Adv.

For the State : Mr. N. Ahmed, Adv.,
Ms. Ayantika Ray, Adv.

Heard & Judgment on : 14.12.2021.

Bibek Chaudhuri, J.-

This is an appeal under Section 374(2) of the Code of Criminal Procedure filed by the convict in Special Case No. 4 of 2006 against the judgment and order of conviction and sentence convicting the appellant under Section 409 of the Indian Penal Code and sentencing him to suffer imprisonment for two years and to pay fine of Rs.3,000/-, in default, simple imprisonment for further two months.

Admittedly, the appellant was an employee of Block Land and Land Revenue Office, Gorubathan in the district of Darjeeling.

Complaint was lodged against him and one Ashok Biswakarma, a Group – 'D' employee attached to the said office alleging, *inter alia*, that they collected land revenue and cess from the raiyats as per Government rate. The amount collected from the tenants was allegedly shown less to the Government receipt by means of malpractices. Thus, less amount was deposited by the appellant and the said Ashok Biswakarma in the Government exchequer and the balance amount was misappropriated by them. Such embezzlement of fund was made by the accused persons while collecting rent in Patengodak Khas Mahal Mouza J.L.No. 05 and Today-Tangta Khas Mahal Mouza J.L.No. 04 under Jaldhaka Police Station during the period between 15th April, 2004 and 16th November, 2004. The written complaint was submitted by the BL & LRO, Gorubathan before the Officer-in-Charge, Jaldhaka Police Station and on the basis of the said written complaint, formal FIR was drawn and Jaldhaka Police Station Case No. 2 of 2005 dated 31st January, 2005 under Section 409 of the Indian Penal Code was registered against the accused persons.

It is pertinent to mention at the outset that initially one M.P. Gurung, Sub-Inspector of Police was entrusted to conduct the investigation of the case. Thereafter, on his transfer the case was entrusted to Sub-Inspector, Hiralal Roy and subsequently on transfer of Hiralal Roy, the case was entrusted to Sub-Inspector, Santosh

Kumar Pradhan who filed charge-sheet under Sections 409/34 of the Indian Penal Code against the appellant and the said Ashok Biswakarma.

As the offence under Section 409 is exclusively triable by the learned Special Judge, the case was transferred to his Court at Darjeeling. On completion of trial, the appellant was convicted and sentenced accordingly for committing offence under Section 409 of the Indian Penal Code. Accused Asok Biswakarma was, however, acquitted from the charge.

Being the first Court of appeal, this Court has the bounden duty to consider the evidence on record independently to come to a finding as to whether the learned Trial Judge was justified in convicting the appellant under Section 409 of the Indian Penal Code and sentencing him accordingly. Out of 10 witnesses P.Ws. 1, 2, 8, 9 and 10 are Police personnel. P.W. 3, Lachhu Brahamin did not support the prosecution case in his evidence. He also failed to identify the appellant during trial. However, he was not declared hostile by the prosecution.

It appears from the evidence of P.W. 4, Padam Rai that about 7 or 8 years ago, accused Ashok Biswakarma came to their village and collected land rent. Subsequently, the Revenue Inspector came to his house and took the original land rent receipt from him.

P.W. 5, Kalu Mukhia, P.W. 6, Sita Nath Das, P.W. 7, Dilbahadur Gurung are the seizure witnesses. From their evidence, it is learnt that they put their signatures on a seizure list on being asked by the Police in their office. They do not have any idea about the papers and documents that were seized by the Police Officers from their office.

P.W. 1, Inspector, Tapan Kumar Bhattacharjee was the Recording Officer of the case. P.W. 2, Sub-Inspector, Hiralal Roy is the second Investigating Officer. It transpires from his evidence that during investigation, he seized a carbon copy of Rent Receipt Book No. 111701 to 111800 from the office of the BL & LRO, Gorubathan in presence of witnesses. According to P.W. 2, the counterfoils of the said rent receipt book were reportedly written by the appellant.

It appears from the evidence of P.W. 10, Sub-Inspector, Pappu Kumar Kajur that on 3rd March, 2005, one Sub-Inspector, M. P. Limboo seized original tax receipt from Jai Singh Chettri in his presence under a seizure list. The said seizure list was marked exhibit 6. Signature of Sub-Inspector, Pappu Kumar Kajur was marked as exhibit 6/1 on the seizure list and the original tax receipts and carbon impression thereof were collectively marked as exhibit 7 series during trial.

It is rightly pointed out by the learned advocate for the appellant that Sub-Inspector, M. P. Limboo was not an Investigating Officer in connection with Jaldhaka Police Station Case No. 2 of 2005. The lower

Court record is absolutely silent as to the authority of Sub-Inspector, M. P. Limboo to seize the documents in connection with this case. Sub-Inspector, Pappu Kumar Kujur who deposed during trial as P.W. 10 was also not involved in the investigation of the case. Therefore, there is no explanation from the prosecution as to how they performed the duties of search and seizure during investigation of Jaldhaka Police Station Case No. 2 of 2005.

In order to bring home charge under Section 409 of the Indian Penal Code the prosecution is under obligation to prove the following ingredients: -

- (i) Accused was a public servant, or a banker or merchant or agent or factor or broker or an attorney;
- (ii) In such capacity accused was entrusted with certain property or he gained domain over such property which was not his own;
- (iii) Accused committed criminal breach of trust with respect to such property.

In the instant case, according to the *de facto* complainant the appellant and one Ashok Biswakarma had domain over the amount of rent which they collected from the landowners during a particular period as land rent and cess. Such land rent and cess were required

to be deposited in Government account. The accused persons deposited a part of it and misappropriated the rest amount of money.

It is rightly pointed out by the learned advocate for the appellant that even assuming the act done by Sub-Inspector, M. P. Limboo as lawful and valid, Sub-Inspector, Pappu Kumar Kajur (P.W. 10) was not the appropriate person to prove the original rent receipt. The original rent receipts could have been proved by the person who issued it or by the person to whom it was issued or by the person who saw the accused preparing/writing the rent receipt. But none of the tenants or Raiyats in favour of whom rent receipt was issued was examined during trial of the case. It is also pointed out by the learned advocate for the appellant that the learned Trial Judge based his judgment and order of conviction against the appellant only on the basis of the report of the handwriting expert. It is found from the record that handwriting and signature of the appellant were taken by the Investigating Officer under the order of the Court and the admitted handwriting and signature of the appellant was sent for comparison by the handwriting expert with the seized original rent receipts and carbon copy of the rent receipts. The handwriting expert of course opined that the writing in the original rent receipts as well as some of the carbon copy of the counterfoils of the rent receipts tallied with the admitted signature of the appellant.

It is important to note that the handwriting expert was not examined during trial of the case. The learned counsel for the appellant draws my attention to the decision of the Hon'ble Supreme Court in **Malay Kumar Ganguly –Vs.- Sukumar Mukherjee & Ors.** reported in **AIR 2010 SC 1162**. In paragraph 45 of the said judgment, the Hon'ble Court reproduced paragraphs 17 to 19 of an earlier decision of the Hon'ble Apex Court in **State of H. P. –Vs.- Jai Lal & Ors.** reported in **(1999) 7 SCC 280**. Paragraph 19 of the said judgment runs thus:-

*"The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in Court and has to face cross-examination. This Court in the case of **Hazi Mohammad Ekramul Haq –Vs.- State of West Bengal, (AIR 1959 SC 488)** concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons".*

In paragraph 49 of the aforesaid judgment, the Hon'ble Supreme Court held: -

"The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken. In a criminal case, subject of course, to the shifting of burden depending upon the statutes and/or the decisions of the superior

Courts, the right of an accused is protected in terms of Article 21 of the Constitution of India. The procedure laid in that behalf, therefore, must be strictly complied with. Exhibits 4, 5 and 6, in my opinion, are not admissible in evidence in the criminal trial”.

The learned counsel for the appellant further refers to a decision reported in 2000 Vol. 2 SCC (Criminal) 1088 to submit that a report of the handwriting expert will not automatically be exhibited in terms of Section 293 and Section 294 of the Code of Criminal Procedure.

On the requirement of examination of the handwriting expert during trial of the case, learned advocate for the appellant further refers to the following decisions reported in **1999 Cr.L.J. (SC) 4294 (State of Himachal Pradesh –Vs.- Jai Lal & Ors.), AIR 1971 SC 1865 (Sait Tarajee Khimchand & Ors. –Vs.- Yelamarti Satyam & Ors.)** and **AIR 1989 Patna 66 (Mostt. Rajwati Devi & Anr. –Vs.- The Joint Director, Consolidation, Govt. of Bihar, Patna & Ors.)**.

Criminal breach of trust is defined in Section 405 of the Indian Penal Code in the following words: -

"405. Criminal breach of trust. - *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be*

discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

The gist of offence of criminal breach of trust is endorsement of property and dishonest misappropriation thereof. The person entrusted may himself misappropriate or he may willfully suffer another person to do so. In the instant case, there is absolutely no evidence as regards the amount of misappropriation against the appellant starting from FIR till the date of delivery of judgment in different course of proceedings, the prosecution could not collect any evidence as to the amount of land rent or part thereof which was allegedly misappropriated by the appellant. I have personally examined exhibit - 7 series. These are the original land rent receipts. In the original land rent receipts, there are certain interpolation or overwriting in respect of different counts of amount charged towards rent or cess from the land owners but on careful examination of the said rent receipts with the counterfoil of the same, this Court cannot ascertain how much amount of money was misappropriated by the appellant or any other words if at all any money was misappropriated by him or not.

In view of the above discussion, this Court finds that the learned Trial Judge did never consider the essential ingredients of offence of criminal breach of trust by a public servant.

For the reasons stated above, the impugned judgment and order of conviction and sentence is liable to be set aside. Accordingly, the instant appeal is **allowed**. The judgment and order of conviction and sentence passed in Special Case No. 4/06 arising out of Jaldakha Police Station Case No. 2/05 dated 31.01.2005 corresponding to G.R. No. 16/05 is set aside.

The appellant be discharged from the bail bond at once.

Let a copy of this judgment be sent to the learned Court below for information and necessary action.

The appellant is at liberty to act on the server copy of this judgment.

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

(Bibek Chaudhuri, J.)

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