

Form J(2)

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

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

**CRA 63 of 2003
Biswanath Sett
-Vs.-
The State of West Bengal & Anr.**

**For the appellant : Mr. Milon Mukherjee, Sr. Adv.,
Mr. Prosenjit Mukherjee, Adv.,
Ms. Sreyashi Biswas, Adv.,
Mr. Saptarshi Chakraborty, Adv.,
Ms. Tiya Ghosh, Adv.**

**For the State : Mr. Swapan Banerjee, Adv.,
Ms. Sujata Das, Adv.**

**Heard on : 06.04.2021,08.03.2022,
24.03.2022,25.03.2022.**

Judgement on : 25.03.2022.

Bibek Chaudhuri, J.

Judgment and order of conviction and sentence passed by the learned Special Judge, 2nd Court at Howrah on 28th January, 2003 in Special Case No. 1/2000 arising out of G.R.Case No. 370/1998 and J. B. Pur Police Station Case No. 22/1998 is assailed in the instant appeal under Section 374(2) of the Code of Criminal Procedure.

The Learned Trial Judge holding the appellant guilty for committing offence under Section 409 of the Indian Penal Code convicted him and passed a sentence of rigorous imprisonment for three months and also to pay fine of Rs.50,000/-, in default, to suffer further rigorous imprisonment for three months.

The above-mentioned police case was registered on the basis of a written complaint submitted by the District Inspector of Schools (SE), Howrah on 1st March, 1998. It is alleged in the written complaint that the appellant being the Headmaster of Jagatballavpur High School withdrew a sum of Rs.10,30,000/- during the period between April, 1997 and July, 1997 for payment of salaries of the teaching and non-teaching staff of the said school. However, he disbursed Rs.8,80,142/- only as salary and other emoluments to the teaching and non-teaching staff for the months of March, 1997 to June, 1997 as per the Bank statement and acquaintance rolls register as well as the statement of accounts submitted by one Bhudeb Jana, the Drawing and Disbursing Officer of the said school and the A.D.I. of schools (SE), Howrah. Thus, it was alleged that the appellant did not disburse the balance sum of Rs.1,49,848/- and the said unpaid amount was misappropriated by the appellant. Police took up the case for investigation which ended in filing charge-sheet against the appellant under Section 409 of the Indian Penal Code. The appellant

submitted himself to face trial before the Learned Court below. Charge under Section 409 of the Indian Penal Code was framed against him. When the said charge was read over and explained to him he pleaded not guilty.

During trial, prosecution examined as many as 19 witnesses. Some documents were exhibited. On due consideration of evidence on record, both oral and documentary, the Learned Trial Judge held the accused guilty for committing offence under Section 409 of the Indian Penal Code and convicted and sentenced him accordingly.

Mr. Milon Mukherjee, Learned Senior Counsel on behalf of the appellant attacks the impugned judgment on the following grounds:-

It is submitted by him at the outset that the case was initiated on the basis of a complaint submitted by District Inspector of Schools (SE), Howrah. The said *de facto* complainant could not depose during trial of the case because she unfortunately expired before the commencement of trial. The written complaint was marked exhibit by the A.D.I. and A.S.I. of the schools, Howrah.

It is further submitted by Mr. Mukherjee that another case under Section 409 of the Indian Penal Code was registered against the accused for criminal misappropriation since March, 1991 till February, 1997 amounting to Rs.5,32,834/- alleging misappropriation of provident fund of the teachers and non-teaching staff of the said

school. In the said case, the appellant was honourably acquitted. Subsequently, the instant written complaint was filed for alleged misappropriation of money for limited period between March, 1997 to June, 1997 payable on April, 1997 to July, 1997.

It is further submitted by Mr. Mukherjee that the allegation against the appellant was misappropriation of a portion of money which he withdrew for payment of salary to the teachers and non-teaching staff of the said school. Therefore, if any part of the money which the appellant allegedly withdrew was not paid to some of the teaching and non-teaching staff of the school. The said teaching and non-teaching staff are the real aggrieved person but they did not file any complaint against the appellant for non-payment of any part of their salary or other emoluments, neither they were examined during trial of the case. Therefore, during trial the prosecution failed to produce evidence of the aggrieved persons who allegedly did not receive any part of their salary or any other emoluments which they are entitled according to law to receive.

It is further pointed out by Mr. Mukherjee that the accused took the specific defence to the effect that some of the employees of the said school prayed for loan and advance from their provident fund contribution. The amount of Rs.10,30,000/- which was withdrawn from the Bank included the loan amount. The said loan amount was

disposed to the employees which would be revealed from cash register and loan register. Surprisingly enough even during trial neither the prosecution, nor the school authority produced the said two registers to falsify the specific case of the appellant. According to the Learned Senior Counsel for the appellant, the instant case is an outcome of dispute between the headmaster and some greedy teachers. A section of teachers did not allow the Headmaster, the appellant herein to enter into the school from July, 1997. The Headmaster was compelled to file an application under Article 226 of the Constitution being W. P. No. 16383(W) of 1997 and was favoured with an order by this Court that he would be eligible to enter into the school and carried out his function as the Headmaster of the school. The said order was passed on 27th March, 1998. Prior to the order having been passed in the above-mentioned writ petition on 27th March, 1998 the FIR of this case was lodged on 1st March, 1998. Therefore, at the time of initiation of the case and during investigation the appellant had no privy over the cash register, advance register and the cashbook. He was not even examined by the Investigating Officer and the said documents were not produced by the prosecution during trial of the case. Learned Trial Judge did not consider the said circumstances during the trial of the case.

The Learned Trial Judge failed to consider that the appellant being a Junior to Usha Ranjan Bhattacharya, Assistant Headmaster of Jagatballavpur High School who deposed during trial as P.W. 1 was the mastermind of the entire dispute. PW-1 took charge as the Headmaster of the said School during the absence of the appellant. It appears from exhibit-13 that night guard of the said school handed over the keys of the school and the office of the Headmaster to PW-1. PW-1 also locked the office of the Headmaster with a new key. During deposition of PW-1, PW-1 proved the relevant "treasury receipt form" in which the PF money of the teaching and non-teaching staff of the School for the month of April, 1997 was deposited under the signature of the appellant, the then Headmaster. Subsequently, a sum of Rs.2,50,000/- was withdrawn on 11th April, 1997, then on 13th May, 1997 a sum of Rs.2,90,000/- was withdrawn. Again on 9th June, 1997, a sum of Rs.2,90,000/- was withdrawn and finally on 11th July, 1997, a sum of Rs.2,00,000/- was withdrawn. Thus, through the said four withdrawals a sum of Rs.10,30,000/- was withdrawn. The exhibit-13 is a document written by Assistant Inspector of Schools(SE), Howrah on 12th May, 1998 to the D.I of Schools admitting the fact that the PF deposit was not submitted during the period between April, 1991 to April, 1997. It is already recorded that for the said period the appellant was acquitted in another case.

Mr. Mukherjee then draws my attention to the evidence of PW-19, who is the investigating officer of this case. In his deposition, he clearly admits that during investigation he told PW-1 to produce cash book, ledger book, PF loan Register and advance Register to him on 29th March, 1998. He also demanded audit report of the School during the period in question but PW-1 did not produce those documents during the period between 01.03.1998 to 28.03.1998. Only on 29th March, 1998 he produced the said documents but those cash book, ledger book, PF loan Register and advance Register was marked in the instant case.

Mr. Swapan Banerjee, learned advocate for the State respondent on the other hand submits that it was the duty of the appellant to produce documents in support of his plea of innocence. He did not produce the said documents. Therefore, the accused person has failed to discharge his burden that he actually deposited the PF amount which was deducted from the salary of the teaching and non-teaching staff and the remaining of money of Rs.1,49,000/- was paid as loan to the employees of the said School.

In order to prove a charge under Section 409 of the Indian Penal Code, it is the incumbent duty of the prosecution to prove the following ingredients:-

- (i) Accused, a public servant was entrusted with property of which he was duty bound to account for and
- (ii) The accused has misappropriated the said property. The term criminal breach of trust has the same meaning as advanced in Section 405 of the Indian Penal Code.

Explanation-I of Section 405 is important for the purpose of the instant case and the same is quoted below:-

“Explanation 1. – A person, being an employer [of an establishment whether exempted under Section 17 of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 or not] who deducts the employee’s contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid”.

Therefore, the gist of offence under Section 405 is entrustment of property and dishonest misappropriation thereof. The person

entrusted may himself misappropriated or may willfully suffer another person to do so.

In order to prove a charge under Section 409 of the Indian Penal Code, prosecution is not required to prove, nor it is possible to prove in every case, in what precise manner the accused had dealt with or appropriated that property which was entrusted to him. When entrustment is proved giving a false account of its use is generally considered to be a strong circumstance against the accused. Rather on prove of entrustment it is for the accused to discharge the burden that entrustment has been carried out as accepted and the obligation has been discharged.

Mr. Banerjee, the learned advocate for the State respondent call upon this court to decide as to whether the accused has discharged his onus or not.

At this stage, it is pertinent to mention that the State respondent probably has forgotten the case of the prosecution. At the risk of repetition, I may be permitted to record that the prosecution case is that the appellant withdraw a sum of Rs.10,30,000/- and could not account for a sum of Rs.1,49,858/-. PW-8, Smt. Arpita Adhikari submitted a report that the appellant allegedly did not deposit the PF amount. PW-9, Smt. Rupali Saha, who was S.I of Schools during relevant period of time deposed that during April, 1997 to June, 1997,

the appellant deposited Rs.7,815/- only towards PF contribution. It is needless to say that this is not a case of non-payment of PF contribution. Thus, a case of embezzlement of money belonging to the Teachers and non-teaching staff which was withdrawn during the period between April, 1997 and July, 1997 allegedly by the appellant. It is also important to note that PW-8, Arpita Adhikari, PW-9, Rupali Saha and PW-7, Subrata Singha were not examined by the investigating officer. Therefore, the entire investigation was directed towards a deviated route to prove that the appellant did not deposit the PF contribution.

The learned trial Judge failed to consider that not a teacher or non-teaching staff came forward to make allegation against the appellant that they did not receive salary and other emoluments during the disputed period of time.

The appellant all along maintained his stand that the said amount of Rs.1,49,858/- was withdrawn for payment of loan and advances and it would be revealed from cash register, advance register and loan register of the School for the relevant period of time that the said amount was disbursed. Prosecution failed to produce the said documents. The learned trial Judge failed to consider the above circumstances during the trial of the case.

For the reasons stated above, this Court of the considered view that the judgement of conviction and sentence passed by the learned Special Judge, 2nd Court at Howrah in Special Case No.1 of 2000 is liable to be set aside. Accordingly, the instant appeal is allowed. The appellant is acquitted of the charge and discharge from his bail bond.

Urgent photostat certified copy of this order may be supplied to the parties expeditiously, if applied for.

[Bibek Chaudhuri, J.]

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