

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 628 of 2012

An application under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973.

AFR **Anirudha Majhi** ----- **Petitioner**

-Versus-

State of Odisha **Opp. Party**

Advocate(s) appeared in this case:-

For Petitioner : M/s. J. Sahoo and B.R. Sahoo,
Advocates

For Opp. Party : Mr. P.K. Maharaj,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

20th June, 2022

SASHIKANTA MISHRA, J.

The present revision is directed against the judgement dated 08.12.2011 passed by learned Sessions Judge, Nabarangpur in Criminal Appeal No. 28 of 2003, whereby the judgement of conviction and sentence passed on 13.08.2003 passed by learned Civil Judge (Sr.

Division)-cum- JMFC, Nabarangpur in G.R. Case No. 495 of 1984 was confirmed. By the said judgement learned trial Court had convicted the petitioner for the offence under section 408 of IPC and sentenced him to undergo S.I. for 2 years and to pay a fine of Rs.5000/-, in default, to undergo further S.I. for 6 months.

2. The brief facts of the case are as follows:

In course of investigation in connection with Kodinga PS case No. 55 of 1984 under Section 408 of IPC, it came to light that the present petitioner Anirudha Majhi while working a Salesman in Kotagaon Sales Centre under Kodinga LAMPCS from 07.01.1981 to 30.10.1981, received goods of different kinds from the Head Office and other Sales Centers and also received the closing balance of Sanagumuda Sales Centre, in all amounting to Rs.33254.81. However, he deposited the sale proceeds at the Head Office and diverted some goods to different Sales Centers and also handed over charge of some goods to another employee, in all amounting to Rs.29294.82, thereby causing a deficit of Rs.3959.99 which was held to be misappropriated. During audit conducted for the said

period also the aforesaid deficit was detected. In such view of the matter, Kodinga P.S. Case No. 86 of 1984 was registered and was investigated. Upon completion of investigation, charge sheet was submitted against the accused petitioner for the offence under Section 408 of IPC. The petitioner was called upon to face trial in G.R. Case No.495 of 1984 arising out of the aforementioned P.S. Case.

The defence took the plea of denial and of false implication.

3. In course of trial, prosecution examined three witnesses out of whom, P.W.-1 was the Accountant of Kodinga LAMPCS, P.W.-2 was the Accountant of Kodinga LAMPCS during the relevant period and P.W.-3 was the Auditor who audited accounts of Kotagaon Sales Center for the relevant period and had submitted report. Learned Trial Court, after considering the evidence on record as also the contentions raised by both sides found the petitioner guilty of the offence under Section 408 of IPC as all the essential ingredients of the said offence were clearly established. As such, the petitioner was convicted for the

aforesaid offence and sentenced as already stated hereinbefore.

The petitioner carried the matter in appeal to the Court of Sessions, which was disposed of by Learned Sessions Judge, Nabarangpur in Criminal Appeal No. 28 of 2003. Learned Appellate Court also went through the evidence on record and held that the same clearly proved that the petitioner being a servant of the Society was entrusted with the property in question which he had misappropriated with a dishonest intention. It was further held that in a case of criminal breach of trust once the entrustment is proved, the onus shifts to the accused to give account of the deficit amount. The prosecution duly proved the entrustment of the entire amount out of which the petitioner could not account for a sum of Rs.3959.99 and therefore, was liable and must be deemed to be guilty of misappropriation. On such findings as also by not accepting the other contentions raised on behalf of the petitioner-accused, learned Appellate Court dismissed the appeal, confirming the judgement of the trial Court thereby.

Feeling further aggrieved, the petitioner accused has moved this Court in the present Revision.

4. Heard Mr. J. Sahoo, learned counsel for the petitioner and Mr. P.K. Maharaj, Learned Additional Standing Counsel for the State.

5. Assailing the impugned judgement passed by the Trial Court, Mr. Sahoo would contend that the petitioner being an employee of the Society had supplied the articles on credit to different persons under the instructions of the Managing Director and therefore, it was entirely erroneous on the part of the Courts below to have held him guilty of misappropriation. It is also contended by Mr. Sahoo that the I.O. of the case was not examined as a witness and therefore, the petitioner was highly prejudiced. Moreover, it is a case which has not been proved beyond all reasonable doubts.

6. Per contra, Mr. P.K. Maharaj has contended that all the essential ingredients constituting the offence under section 408 of IPC have been clearly proved by oral and documentary evidence on record and therefore, there is no reason for this Court to interfere in the matter. It is

also contended that once the entrustment is proved it is up to the defence to account for the same and in case he fails to do so, it must be held to be a case of misappropriation.

7. A reading of the evidence on record shows that the petitioner was working as a Salesman of Kotagaon Sales Centre under Kodinga Large Sized Multipurpose Cooperative Society Ltd. (LAMPCS). It is further evident that he was entrusted with goods of different kinds from the Head Office and other Sales Centers and also received the closing balance of Sanagumuda Sales Center, in all amounting to Rs.33,254.81. Out of the said amount, the petitioner is said to have deposited the sale proceeds amounting to Rs.29,294.82. There is a deficit of Rs.3959.99. In so far as the offence under Section 408 of IPC is concerned, the prosecution is required to prove: (i) that the accused is a clerk or servant of the person reposing trust; (ii) that he was in such capacity entrusted with the property in question or had dominion over it; and (iii) he committed criminal breach of trust in respect of such property. As it

appears, P.W.-1 was an Accountant of Kodinga LAMPCS having taken charge on 24.08.1982. The relevant period is said to be 07.01.1981 to 30.10.1981 and as such evidence of the P.W.-1 is not helpful to the prosecution. P.W.-2 has clearly stated that the accused petitioner was the Salesman in the concerned Sales Centre during the relevant period and as Accountant he was supplying goods to the accused and also received the sale proceeds from the accused. In such regard he has proved the liability register under Ext. 1. The accused petitioner has never disputed that he was working as a Salesman during the relevant period. Therefore, it is to be held that the petitioner was working as a servant of the Society during the relevant period. As regards entrustment, prosecution has adduced documentary evidence in the form of internal and external invoices, cash receipts etc. On consideration of all the documentary evidence referred above, it is clearly established that the accused was entrusted with total goods worth Rs.33,254.81 out of which he deposited sale proceeds amounting to Rs.29,294.82. Thus, entrustment of the goods during the relevant period to the

petitioner is also clearly established. As regards breach of trust, it is for the prosecution to show that the property entrusted was not utilized in the manner intended. The petitioner having received goods worth Rs.33254.81, was duty bound to deposit the sale proceeds for the entire amount. But in the instant case, the evidence clearly shows that the petitioner had deposited only Rs.29,294.82 leaving a deficit of Rs.3959.99. Law is well settled that if entrustment is proved, it is for the defence to duly account for the same and therefore, entrustment of the petitioner in the instant case to account for the deficit of Rs.3959.99. Though it is contended by Mr. Sahoo that the petitioner had given certain goods on credit to different persons on the instructions of the Managing Director, yet the same appears to be an afterthought because such plea was never taken during the trial either by adducing positive evidence or even by giving suggestions to such effect to the prosecution witnesses. Since the very foundation of this plea was never laid during trial, the same cannot be accepted at this belated stage. As has already been stated hereinbefore, the

petitioner was unable to account for the deficit amount of Rs.3959.99. In the absence of proper explanation for the deficit which might be officially acceptable, the only inference available to be drawn is that the same had misappropriated by the petitioner. To the above extent therefore, this Court finds no infirmity, much less any illegality in the findings of the Trial Court as confirmed by the Appellate Court.

8. As regards the other contention raised by Mr. Sahoo that the accused was seriously prejudiced because of non-examination of the Investigating Officer, it is seen that in course of cross-examination of the prosecution witnesses not a single contradiction has been confronted to them by the accused. The examination of the Investigating Officer assumes significance particularly when there are contradictions in the statements of other witness to confront him with. Therefore, as has rightly been held by the Trial Court as well as the Appellate Court, non-examination of the Investigating Officer cannot be treated as fatal to the case of prosecution nor the petitioner could be held to have been prejudiced thereby.

It is also not clearly stated as to how the case of the defence would have improved had the prosecution examined the Investigating Officer. The contention so raised is therefore not acceptable.

9. It is alternatively contended by Mr. Sahoo that even assuming that the order of conviction cannot be faulted with then also the sentence imposed is harsh and grossly disproportionate to the offence committed by the petitioner. Since the amount of misappropriation is very small being Rs.3959.99 only, the sentence of simple imprisonment for 2 years and fine of Rs.5000 with default sentence is highly excessive, harsh and disproportionate. It is further submitted that the occurrence took place in the year 1981 and the trial was of the year 2003. The petitioner was then aged about 45 years. 20 years have elapsed in the meantime which makes the petitioner presently aged about 65 years. The petitioner has spent some time in prison during trial. It is therefore submitted that instead of sending him to prison at this stage, he should be released as per the provisions of Probation of Offenders Act. Mr. P.K. Maharaj has argued that by

passing a sentence of simple imprisonment, the Trial Court has already taken a lenient view and therefore, no further leniency is warranted.

10. After considering the submissions made on behalf of the petitioner and the facts and circumstances of the case, the small amount of misappropriation and the advanced age of the petitioner coupled with the fact that no criminal antecedents are reported against him, this Court is of the considered view that ends of justice would be best served if, instead of directing the petitioner to serve the remaining part of sentence in jail, he is released as per the provisions of Section 4 of the Probation of Offenders Act.

11. In the result, the Criminal Revision is allowed in part. The impugned order of conviction passed by the Trial Court and confirmed by the Appellate Court is hereby maintained. However, the sentence passed by the Trial Court is modified to the extent that instead of serving the remaining part of the sentence, the petitioner shall be released as per the provisions of Section 4 of the Probation of Offenders Act. For the above purpose the petitioner

shall appear before the Trial Court on 21st July, 2022, failing which it shall be open to the Trial Court to pass necessary orders to take him into custody and send him to prison to serve the remaining part of the sentence as imposed originally.

12. The Criminal Revision is disposed of.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 20th June, 2022/ A.K. Rana

