**IN THE HIGH COURT AT CALCUTTA**
**CRIMINAL APPELLATE JURISDICTION**
**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Ananya Bandyopadhyay**

**C.R.A. 166 of 2008**

**Nemai Chandra Pal**
**-Vs-**
**The State of West Bengal**

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| *Amicus Curiae* | : Mr. Arnab Chatterjee |
| For the State | : Ms. Faria Hossain<br>Mr. Anand Keshari |
| Heard on | : 01.08.2023, 02.08.2023, 03.10.2023 |
| Judgment on | : 18.12.2023. |

**Ananya Bandyopadhyay, J.:-**

1. This appeal is preferred against the judgment and orders dated 21.02.2008 and 22.02.2008 passed by the Learned Judge, First Special Court, Bankura Special Court Case No. 29/1997 under Section 409 of the Indian Penal Code which was pending before the Learned Judge, First Special Court, Bankura thereby convicting the appellant for commission of offence under Section 409 of the Indian Penal Code, 1860 and sentencing him to suffer rigorous imprisonment for a period of 5 years and to pay fine of Rs. 25,000/-, in default, to suffer rigorous imprisonment for 1 year for the offence under Section 409 of the Indian Penal Code committed on 28.09.1994 and also sentencing him to suffer rigorous imprisonment for a

period of 5 years and to pay fine of Rs. 30,000/-, in default, to suffer rigorous imprisonment for 1 year for the offence under Section 409 of the Indian Penal Code committed on 25.02.1995 and both has sentences were directed to run concurrently.

2. The criminal law was set into motion in the instant case by Sibsankar Dutta, Manager, UCO Bank, Raipur Branch, the PW-2 who lodged a written complaint with the Raipur Police Station.

3. The prosecution case, inter alia was as follows that 'on 28.09.1994 and 25.02.1995, a sum of Rs. 25,000/- and Rs. 30,000/- were fraudulently withdrawn from the S.B. A/C No. 5870 belonging to one Santosh Barik; that during balancing of book, it was revealed that the aforesaid withdrawals were allowed despite no sufficient credit balance in S.B. A/C No. 5870 and on being detected Santosh Barik was contacted who in writing informed the Bank denying his signatures appearing in the withdrawal slips; that the withdrawals slips were passed for payment in violation of Banking Rules without verifying the credit balance of S.B. A/C No. 5870 and withdrawal slips were passed for payment by the appellant, the then manager of Raipur Branch.'

4. Appellant stated that on the basis of the aforesaid written complaint police took up investigation.

5. Appellant stated that on completion of re-investigation of the case investigating agency submitted Charge-Sheet under Section 409 of the Indian Penal Code against the appellant.

6. Appellant stated that copies were supplied to the appellant in compliance with the provision of Section 207 of the Code of Criminal Procedure, 1973.
7. Appellant stated that subsequently by an order dated 15.07.1998 charges under Section 409 of the Indian Penal Code were framed against the appellant and read over and explained to him to which he pleaded not guilty and claimed to be tried.
8. Appellant stated that in order to substantiate the charges 8 witnesses were examined on behalf of the prosecution amongst whom PW-2 is the de-facto complainant. The prosecution also exhibited various documents and articles.
9. Appellant stated that the defence produced 1 witness in its favour and tried to dismantle the prosecution case as well as substantiate its own case by his examination and through effective cross examination.
10. Appellant stated that, however, upon purported consideration of the evidence and materials on record the Learned Judge, First Special Court, Bankure by judgment and orders dated 21.02.2008 and 22.02.2008 was pleaded to convict the appellant for commission of offence under Section 409 of the Indian Penal Code, 1860 and sentenced him to suffer rigorous imprisonment for a period of 5 years and to pay fine of Rs. 25,000/-, in default, to suffer rigorous imprisonment for 1 year for the offence under Section 409 of the Indian Penal Code committed on 28.09.1994 and also sentenced him to suffer rigorous imprisonment for a period of 5 years and to pay fine of Rs. 30,000/-, in default, to suffer rigorous imprisonment for 1

year for the offence under Section 409 of the Indian Penal Code committed on 25.02.1995 and both the sentences were directed to run concurrently.

11. Learned Advocate for appellant submitted that-

i. The judgment of the Learned Judge is not a proper judgment, in as much as, the Learned Judge failed to consider the various infirmities in the prosecution evidence which falsify the prosecution case and this has vitiated his judgment.

ii. The judgment of the Learned Judge is based on conjectures and surmises not warranted by the evidence on record.

iii. The judgment of the Learned Judge has been vitiated by reasons of non-consideration of materials which were elicited in the cross-examination of prosecution witnesses.

iv. The ingredients of the offence charged not having been established, the conviction of the appellant is not sustainable in law.

v. The Learned Judge illegally relied upon the prosecution case and came to a finding of guilt against the appellant.

vi. The investigation of the instant case has been done in a perfunctory manner and the same has caused extreme prejudice to the appellant.

vii. The evidence of the prosecution witnesses suffer from gross contradictions and/or embellishments and the same is rendered highly unreliable in nature and ought not to form the basis of conviction in the instant case.

viii. The deposition of the prosecution witnesses does not establish the essential ingredients of the offences punishable either under Section 409 of the Indian Penal Code.

ix. The Learned Judge failed to appreciate that there is no evidence in respect of the alleged offences.

x. Learned Judge failed to appreciate that all the so-called independent witnesses are interested witnesses and their evidence should not be the basis of the conviction in the instant case.

xi. The Learned Judge failed to consider the evidence of the defence witness of the case in its proper perspective and has rejected the same on vague surmises and conjectures.

xii. The Learned Judge has failed to appreciate that from the evidence of PW-2, PW-3 and DW-1, there was no entrustment of property to the appellant and hence Section 409 of the Indian Penal Code has no manner of application in the instant case.

xiii. The Learned Judge has failed to appreciate that no hand writing expert was examined to ascertain whether the withdrawal slips were signed by the PW-5.

xiv. The depositions of various prosecution witnesses suffer from gross contradictions and/or infirmities which prove beyond all doubt that their depositions are totally false and fabricated.

xv. In view of the fact that both the recovery of stolen property and identification of the appellant are illegal, therefore acquittal of the appellant was the only legal conclusion possible.

xvi. The charge framed in the instant case is illegal, contrary to and bereft of material particulars and has occasioned a failure of justice.

xvii. The Learned Judge has accepted the version of the prosecution witnesses as gospel truth and illegally convicted the appellant on such unreliable and flimsy evidence.

xviii. The Learned Judge failed to consider the defence version of the case in its proper perspective and has rejected the same on vague surmises and conjectures.

xix. The examination of the appellant under Section 313 of the Code of Criminal Procedure, 1973 was illegal, violative of the principles of natural justice and fair play and has caused gross prejudice to the appellant and has rendered a mistrial in the eyes of law.

xx. The Learned Judge ought to have relied on the principle of law that when two possibilities, one of the commission of crime and the other of innocence are reasonably possible, the accused is entitled to the benefit of doubt.

xxi. The Learned Judge should have considered that accused may appear to be guilty on the basis of suspicion, but that cannot amount to legal proof.

xxii. The Learned Judge by convicting the appellant despite the absence of any concrete evidence to prove the culpability of the appellant have caused grave miscarriage of justice and hence the impugned judgment is liable to be set aside.

xxiii. The impugned judgment and order is otherwise bad in law and liable to be set aside.

xxiv. The Learned Judge failed to consider that graver the nature of the offence charged greater is the standard of proof required to sustain conviction.

xxv. The Learned Judge erred in law as well as in fact and illegally passed the judgment and order of conviction and probation.

xxvi. The sentences passed are much too severe and are illegal in nature.

xxvii. The Learned Judger has passed the judgment and order of conviction without discussing the various infirmities in the prosecution evidence shown by the defence and therefore has passed a non speaking order which is wholly illegal and should be summarily set aside.

xxviii. The order of conviction is not consistent with the materials on record and as such the impugned order of conviction and sentence are liable to be set aside.

12. Heard the submissions of the Learned Advocate for the State.

13. A circumspection of the prosecution witnesses revealed as follows:-

(i) PW-1, holding the position of Branch Manager at U.C.O. Bank, Raipur Branch, made a statement affirming the submission of a written complaint to the Raipur Police Station while discharging duties on 1.11.1995. While conducting banking responsibilities, discrepancies in multiple accounts were discovered while reconciling savings bank books. It was noted that Rs. 25,000/- was withdrawn from account number 5870 on 28.9.1994, and Rs. 30,000/- on 25.2.1995. At the time of the incident, the appellant served as the Manager of the aforementioned bank. The account from which the sums were withdrawn belonged to PW-5. Subsequently, PW-5 was notified and reported that he had not authorized the withdrawals by signing the respective withdrawal slips and did not receive the withdrawn amounts. Upon reviewing the ledger and other documents, PW-5 reported the mentioned money withdrawals to higher authorities, leading to the submission of a written complaint to the Raipur police station, documented as Ext. 1. The withdrawal slips used for these transactions, marked as Ext. 3 and 3/1, were authorized by the appellant, with their signatures marked as Ext. 3/2 and 3/3. A police officer seized specific documents from the bank pursuant to a seizure list, identified as Ext. 4, with the signature documented as Ext. 4/1.

(ii) During the cross-examination, PW-1 clarified that it was not within the appellant's duties to receive withdrawal slips or checks and dispense cash. The cashier was responsible for cash disbursement following authorization from the passing officer. Customers were required to deposit their account passbooks along with withdrawal slips for cash withdrawals, receiving a token in return. After the passing of the withdrawal slip and readiness for payment, the customer's name would be called at the paying counter. Upon return of the token, the paying cashier facilitated the payment, obtaining the recipient's signature on the back of the cheque or withdrawal slip. For withdrawals up to Rs. 5000/-, payment was made to the bearer of the slip, while amounts exceeding Rs. 5000/- required personal identification by the Branch Manager for payment to the bearer.

(iii) Regarding the two withdrawal slips, one bore the signature of PW-5, while the other had signatures of both PW-5 and PW-6. The Manager did not personally identify PW-6's signature on the slip. PW-1 emphasized that the recipient of the money was obligated to sign on the back of the withdrawal slip, and the bank had no responsibility to obtain the recipient's signature during the cash payment stage. Verification of signatures was attempted, although Managers were not considered handwriting experts. In instances of passbook theft or loss, a duplicate was issued upon proper application. PW-1 confirmed the verification of PW-5's passbook and the absence of records for a duplicate passbook issuance for the mentioned bank account.

(iv) Notably, no complaint was filed against the paying cashier. The ledger folio, maintained as part of official business procedures, was seized by the police under a seizure list. Ledger entries were recorded based on deposit and withdrawal slips. It was observed that on 28.9.1994, a cash deposit of Rs. 3000/- was made, resulting in a balance of Rs. 5187/- in the account. On 25.2.1995, no sum was withdrawn, leaving a balance of Rs. 187/-. The ledger folio pertaining to PW-5 was identified as Ext. 8, while the deposit slip's counter-foil was marked as Ext. 9.

(v) PW-2, employed as a clerk at U.C.O. Bank, Raipur Branch on 1.11.1995, coinciding with the arrival of PW-1 as the Bank's Manager, was involved during the identification of discrepancies within the savings bank accounts. It was revealed that withdrawals amounting to Rs. 25,000/- on 28.9.1994, and Rs. 30,000/- on 25.2.1995, were noted from the savings book of PW-5, despite insufficient funds in their account. Notably, these transactions occurred during the appellant's tenure as the branch manager. Subsequently, police authorities arrived at the office premises and conducted a seizure of specific documents. The signature of PW-2 on the seizure list was documented as Ext. 4/2.

(vi) Regarding the ledger book, it was described as a loose leaf ledger employing a system where slips could be inserted sequentially and maintained tied together with two boards. Accessing a particular leaf involved opening the boards. Emphasis was placed on the necessity of obtaining the recipient's signature on the back of the withdrawal slip during the cash payment process subsequent to token retrieval.

(vii) PW-3, holding the position of clerk cum assistant cashier at the Raipur Branch of the U.C.O Bank on 1.11.1995, reported that on the aforementioned date, the appellant was functioning as the Manager of the said branch. Subsequently, PW-1 succeeded the appellant in the managerial role. During the course of executing his duties, PW-1 identified an irregularity concerning the bank account of PW-5, particularly relating to a total sum of Rs. 55,000/-. This anomaly was noted to have occurred during the appellant's tenure as manager, with withdrawals of Rs. 30,000/- on 25.2.1995, and Rs. 25,000/- on 28.9.1994, from PW-5's account.

(viii) PW-3, responsible for cashier duties due to the absence of a full-time cashier, recalled that on the specified dates, the appellant had issued pay orders following the receipt of withdrawal slips. After attempting to verify the signature and calling PW-5 without receiving a response, PW-3 was informed by the appellant that PW-5 was temporarily unavailable and that the funds should be handed over to the appellant, to be later collected by PW-5. Accordingly, PW-3 disbursed the funds to the appellant on both occasions. The subsequent day, the appellant informed PW-3 that PW-5 had retrieved the total amount from him. The withdrawal slips were documented as Ext. 3 and 3/1, with the appellant's signatures on them marked as Ext. 3/2 and 3/3. Notably, the withdrawal slip for Rs. 30,000/- bore only one signature of PW-5 on the back, and similarly, the withdrawal slip for Rs. 25,000/- also had only one signature of PW-5 on the reverse side.

(ix) During cross-examination, PW-3 acknowledged familiarity with the guidelines stipulated in the bank's manual and awareness of the relevant instructions. He outlined the standard protocol for withdrawals, which entailed customers depositing their withdrawal slips and passbooks with the bank. PW-3's responsibilities included scrutinizing both documents. Initially, these items were presented to the token clerk, although PW-3 could not confirm the identity of the token clerk on the dates in question. PW-3 affirmed that neither PW-5 nor PW-6 signed the withdrawal slips in his presence. His duty entailed making payments after retrieving the tokens initially issued to customers. The completion of his cash book, necessary for reconciling the cash account with the physical cash, was contingent on the return of these tokens. According to the manual, the cashier was obliged to record the recipient's name and the amount in the cash book before executing the payment. Post receipt of the withdrawal slip and passbook, these were forwarded to the Manager, who then sends them to the ledger clerk for verification against the accounts and ledger. The ledger clerk's approval prompts the Manager to issue a pay order. At the payment stage, PW-3 verifies the account number, withdrawal slip, and the payable amount. Verifying the account balance in the passbook was not within PW-3's duties. However, it was incumbent upon PW-3 to make the necessary debit and credit entries in the passbook before returning it to the recipient, in line with the protocol that the passbook cannot be returned without recording such transactions.

(x) PW-4, who was serving in the capacity of Assistant Manager at the Raipur Branch of U.C.O Bank as of 1.11.1995, reported that on this particular date, law enforcement officials executed a seizure of various documents from the bank. The signature of PW-4 was officially recorded on the seizure list and was designated as Exhibit 4/3 for identification and reference purposes in the proceedings.

(xi) In the course of cross-examination, PW-4 disclosed discrepancies observed in the bank's records. Specifically, it was noted that the passbook of PW-5 indicated a deposit of Rs. 3,000/-, yet there was no corresponding record of a withdrawal on the same date. Furthermore, on 25.2.1995, the records of the account belonging to PW-5 showed neither withdrawals nor any other form of transaction, thereby suggesting an inconsistency with previous claims or reports concerning account activity on that date.

(xii) PW-5, identified as a holder of a savings account no. 5870 with the concerned financial institution, categorically denied having made any withdrawals from the said account on the dates of 28.9.1994, and 25.2.1995. He asserted that his signature did not appear on any withdrawal slips corresponding to these dates. The passbook pertaining to account number 5870 was duly submitted for examination and marked as Exhibit 5, while the specimen signature of PW-5 was recorded and marked as Exhibit 6 for the purposes of this legal proceeding.

(xiii) During the process of cross-examination, PW-5 elucidated on his personal connections, identifying PW-6 as his brother, albeit in a local, customary sense rather than by blood relation. He further clarified his interactions with the bank, acknowledging his presence at the banking facility on 28.9.1994, but negating any visit on 25.2.1995. Additionally, PW-5 confirmed that he had made a deposit of Rs. 3,000/- into his savings bank account on 28.2.1994, thereby contributing to the transaction history of his account on that particular date. The testimony served to provide further insight into the activities and transactions associated with

PW-5's savings account, particularly in relation to the disputed withdrawal transactions.

(xiv) PW-6, during their testimony, categorically stated that they did not hold any account at the U.C.O Bank in question. Furthermore, PW-6 expressly denied involvement in signing any withdrawal slip for the transaction dated 28.9.1994. In a critical assertion, PW-6 contested the authenticity of the signature found on the back of the withdrawal slip, claiming it was not executed by them. To facilitate a comparison and validation process, the specimen signature of PW-6 was submitted into evidence and designated as Exhibit 7.

(xv) PW-7, appointed as the D.E.O at D.E.B. Bankura, embarked on the investigation of Raipur P.S. Case No. 28/95, which was initiated on 1.11.1995. In the course of the investigation, on 30.11.1995, PW-7 undertook the examination of PW-5, during which the specimen signature of PW-5 was acquired for evidentiary purposes. Subsequent to this, on 26.12.1995, PW-7 executed the seizure of PW-5's passbook and compiled a corresponding seizure list, subsequently marked as Exhibit 10.

(xvi) In furtherance of the investigation, PW-7 visited the U.C.O. Bank in question and conducted an interrogation of PW-1. The endorsement pertaining to the case, identified as Exhibit 1/1, was made. It was pertinent to note that the formal F.I.R. for the case was filed on 1.11.1995, based on a written complaint, and was designated as Exhibit 11 for reference in the legal proceedings.

(xvii) During cross-examination, PW-7 disclosed that the specimen signatures of PW-5 were not forwarded to a handwriting expert for analysis. Additionally, PW-7 confirmed that no deposit or withdrawal slips pertaining to PW-5's account were seized as part of the investigation. These revelations during the cross-examination highlight certain limitations in the scope of the investigation conducted by PW-7.

(xix) PW-8, assigned as the Sub-Inspector of Police at D.E.B., Bankura, assumed responsibility for investigating Raipur P.S. Case No. 28, initiated on 1.11.1995, beginning on 16.4.1996. During the investigation, PW-8 conducted a visit to the place of occurrence, where he performed a series of critical investigative actions. This included the examination of witnesses, whose statements were recorded under Section 161 of the Code of Criminal Procedure. Based on the findings of the investigation, PW-8 proceeded to submit a charge sheet under Section 409 of the Indian Penal Code, which pertains to criminal breach of trust by a public servant, or by banker, merchant, or agent.

(xx) However, during the investigation, PW-8 did not delve into understanding the specific procedures of the banking system regarding deposits and withdrawals. Furthermore, PW-8 did not investigate the issuance of a duplicate passbook, a factor that could be relevant in the context of the banking discrepancies under scrutiny.

(xxi) Another potential relevance in the investigation was the deposit entry in the passbook dated 2.8.1994, which showed a deposit of Rs. 3,000/-. PW-8 did not seize the deposit slip for this transaction, nor did he investigate who made the deposit on 28.9.1994, despite the mention of this date in the passbook. The lack of investigation into the deposit details, particularly in relation to the deposit of Rs. 3,000/- on 28.9.1994, might be considered a gap in the investigative process, potentially overlooking crucial evidence or leads that could have further elucidated the circumstances surrounding the alleged financial discrepancies.

14. Section 409 of the Indian Penal Code states as follows:-

*"**Criminal breach of trust by public, servant. or by banker, merchant or agent** - Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

15. In **N. Raghavender v. State of Andhra Pradesh, CBI**[1], the Hon'ble Supreme Court observed that:-

> *"**41.** Section 409 IPC pertains to criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. (See : Sadupati Nageswara Rao v. State of Andhra Pradesh).*
>
> ***42.** The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an offence punishable under Section 409 IPC. The expression 'criminal breach of trust' is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc. shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied:*
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> *(i) Entrusting any person with property or with any dominion over property;*
>
> *(ii) That person has dishonestly mis-appropriated or converted that property to his own use;*
>
> *(iii) Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.*

[1] **2021 SCC OnLine SC 1232**

***43.*** *It ought to be noted that the crucial word used in Section 405 IPC is 'dishonestly' and therefore, it pre-supposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is 'mis-appropriates' which means improperly setting apart for ones use and to the exclusion of the owner.*

***44.*** *No sooner are the two fundamental ingredients of 'criminal breach of trust' within the meaning of Section 405 IPC proved, and if such criminal breach is caused by a public servant or a banker, merchant or agent, the said offence of criminal breach of trust is punishable under Section 409 IPC, for which it is essential to prove that:*

*(i) The accused must be a public servant or a banker, merchant or agent;*

*(ii) He/She must have been entrusted, in such capacity, with property; and*

*(iii) He/She must have committed breach of trust in respect of such property.*

***45.*** *Accordingly, unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was 'entrusted' to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof. Where the 'entrustment' is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-à-vis the entrusted property was carried out in a legally and contractually acceptable manner………*

***62.*** *As already clarified by us, to prove the charge under Section 409 IPC, the prosecution need not prove the exact manner of misappropriation. Once the 'entrustment' is admitted or proved, as has been done in the present case, the onus lies on the Accused to prove that the entrusted property was dealt by him in an acceptable manner. Thus, misappropriation with this dishonest intention is one of the most important ingredients of proof of 'criminal breach of trust'. The offence under Section 409 IPC can be committed in varied manners, and as we are concerned with its applicability in the case of a bank officer, it is fruitful to point out that the banker is one who receives money to be drawn out again when the owner* *has occasion for it. Since the present case involves a conventional bank transaction, it may be further noted that in such situations, the customer is the lender and the bank is the borrower, the latter being under a super added obligation of honouring the customer's cheques up to the amount of the money received and still in the banker's hands. The money that a customer deposits in a bank is not held by the latter on trust for him. It becomes a part of the banker's funds who is under a contractual obligation to pay the sum deposited by a customer to him on demand with the agreed rate of interest. Such a relationship between the customer and the Bank is one of a creditor and a debtor. The Bank is liable to pay money back to the customers when called upon, but until it's called upon to pay it, the Bank is entitled to utilize the money in any manner for earning profit."*

16. In **Sadhupati Nageswara Rao v. State of Andhra Pradesh**[2], the Hon'ble Supreme Court observed that:-

> *"**14.** In order to prove the offence of criminal breach of trust which attracts the provision of Section 409 IPC, the prosecution must prove that one who is, in any manner, entrusted with the property, in this case as a dealer of fair price shop, dishonestly misappropriates the property, commits criminal breach of trust in respect of that property. In other words, in order to sustain conviction under Section 409 IPC, two ingredients are to be proved, namely,*
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> *(i) the accused, a public servant or a banker or agent was entrusted with the property of which he is duty-bound to account for; and*
>
> *(ii) the accused has committed criminal breach of trust. What amounts to criminal breach of trust is provided under Section 405 IPC.*
>
> *The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (i) entrustment, and (ii) 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 it..................*

[2] **(2012) 8 SCC 547**

***21.*** *Section 409 enables the court to award imprisonment for life or imprisonment up to ten years along with fine. Considering the fact that the appellant was awarded imprisonment for 6 months along with a fine of Rs 1000 only, we feel that the same is not excessive. On the other hand, we are of the view that persons dealing with the property of the Government and entrusted with the task of distribution under FFWS, it is but proper on their part to maintain true accounts, hand over coupons to the Mandal Revenue Office and to execute the same fully and without any lapse. Such recourse has not been followed by the appellant. The courts cannot take lenient view in awarding sentence on the ground of sympathy or delay, particularly, if it relates to distribution of essential commodities under any scheme of the Government intended to benefit the public at large. Accordingly, while rejecting the request of the learned Senior Counsel for the appellant, we hold that there is no ground for reduction of sentence."*

17. In **Supdt. & Remembrancer of Legal Affairs v. S.K. Roy**[3], the Hon'ble Supreme Court observed that:-

***"12.*** *To constitute an offence under Section 409IPC, it is not required that misappropriation must necessarily take place after the creation of a legally correct entrustment or dominion over property. The entrustment may arise in "any manner whatsoever". That manner may or may not involve fraudulent conduct of the accused. Section 409IPC, covers dishonest misappropriation in both types of cases; that is to say, those where the receipt of property is itself fraudulent or improper and those where the public servant misappropriates what may have been quite properly and innocently received. All that is required is what may be described as "entrustment" or acquisition of dominion over property in the capacity of a public, servant who, as a result of it, becomes charged with a duty to act in a particular way, or, atleast honestly......................*

[3] (1974) 4 SCC 230

***15.** The obligation to act in a certain manner with regard to or to deal honestly with property, over which a public servant obtains dominion or control by the use of his official capacity, may arise either expressly or impliedly. Even if the respondent or the Life Insurance Corporation, on whose behalf the respondent, who had certainly been entrusted with it by the policy holders by reason of his official capacity, should have correctly shown it in the account books which ought not to have been falsified by him. It could not be contended that even a mistaken receipt of money in official capacity does not create an obligation upon the receiver as a public servant. We think that it is enough if the payment is made by a person dealing with a public servant in his capacity as a public servant even if it is made on an erroneous assumption which the public servant concerned does nothing to remove. Section 409IPC, seems to us to be meant for the protection, among others, of those dealing with public servants purporting to have the authority to act in a certain way in exercise of their official capacities. A legal defect in the scope of the ostensible authority of a public servant does not prevent an entrustment to or an obligation to be fastened upon a public servant in his capacity as a public servant if the facts of the case establish, as they do in the case before us, the required nexus or connection between acts which create the obligation and the capacity. We, therefore, hold that the respondent is guilty of an offence punishable under Section 409IPC, which could be tried by the Special Court."*

18. In **R.K. Dalmia v. Delhi Admn.**[4], the Hon'ble Supreme Court observed that:-

*"**40.** We may now pass on to the other points raised by Mr Dingle Foot. Section 405 IPC defines what amounts to criminal breach of trust. It reads: "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*

[4] 1962 SCC OnLine SC 83

*made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."*

*Section 406 provides for punishment for criminal breach of trust. Section 407 provides for punishment for criminal breach of trust committed by a carrier, wharfinger or warehouse-keeper, with respect to property entrusted to them as such and makes their offence more severe than the offence under Section 406. Similarly, Section 408 makes the criminal breach of trust committed by a clerk or servant entrusted in any manner, in such capacity, with property or with any dominion over property, more severely punishable than the offence of criminal breach of trust under Section 406. Offences under Sections 407 and 408 are similarly punishable. The last section in the series is Section 409 which provides for a still heavier punishment when criminal breach of trust is committed by persons mentioned in that section. The section reads:*

*"Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may be extended to ten years, and shall also be liable to fine."…………….*

***92.*** *What Section 409 IPC requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression "in the way of his business" means that the property is entrusted to him "in the ordinary course of his duty or habitual occupation or profession or trade". He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of Section 409 IPC if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in Reg. v. Portugal [(1885) 16 QBD 487] or in Mahumarakalage Edward Andrew Cooray case [1953 AC 407] and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression "in the way of his* *business" is used in place of the expression "in his capacity", to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in Sections 406 to 408 IPC The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent. We need not speculate about the reasons which induced the legislature to make the breach of trust by an agent more severely punishable than the breach of trust committed by any servant. The agent acts mostly as a representative of the principal and has more powers in dealing with the property of the principal and, consequently, there are greater chances of his misappropriating the property if he be so minded and less chances of his detection. However, the interpretation we have put on the expression "in the way of his business" is also borne out from the dictionary meanings of that expression and the meanings of the words "business" and "way", and we give these below for convenience.*

*"In the way of"— of the nature of, belonging to the class of, in the course of or routine of*

*(Shorter Oxford English Dictionary)*

*— in the matter of, as regards, by way of*

*(Webster's New International Dictionary, 2nd Edn., Unabridged)*

*"Business" —occupation, work*

*(Shorter Oxford English Dictionary)*

*— mercantile transactions, buying and selling, duty, special imposed or undertaken service, regular occupation (Webster's New International Dictionary, 2nd Ed., Unabridged)*

*—duty, province, habitual occupation, profession, trade (Oxford Concise Dictionary)*

*"Way" —scope, sphere, range, line of occupation*

*(Oxford Concise Dictionary)"*

19. In view of the above discussions it appears that the appellant was not solely responsible in creating the deposit or withdrawal slips and acted in supervisory capacity. The transactions involved the activities of other staff who were not implicated.

20. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.

21. Under such facts and circumstances, the judgment and orders dated 21.02.2008 and 22.02.2008 passed by the Learned Judge, First Special Court, Bankura Special Court Case No. 29/1997 under Section 409 of the Indian Penal Code which was pending before the Learned Judge, First Special Court, Bankura thereby convicting the appellant for commission of offence under Section 409 of the Indian Penal Code, 1860 and sentencing him to suffer rigorous imprisonment for a period of 5 years and to pay fine of Rs. 25,000/-, in default, to suffer rigorous imprisonment for 1 year for the offence under Section 409 of the Indian Penal Code committed on 28.09.1994 and also sentencing him to suffer rigorous imprisonment for a period of 5 years and to pay fine of Rs. 30,000/-, in default, to suffer rigorous imprisonment for 1 year for the offence under Section 409 of the Indian Penal Code is set aside.

22. The instant criminal appeal being CRA 166 of 2008 stands disposed of.

23. There is no order as to cost.

24. I record my appreciation for the able assistance rendered by Learned Advocate, Mr. Arnab Chatterjee, as *Amicus Curiae* in disposing of the appeal.

25. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

26. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

**(Ananya Bandyopadhyay, J.)**