IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 271 of 2000

Prosanta Kumar Chakraborty
-Vs-
State of West Bengal

For the Appellant	: Mr. Aniruddha Bhattacharya Mr. P. Basu Mallick Ms. Ritu Das
For the State	: Mr. Narayan Prasad Agarwala Mr. Pratick Bose
Heard on	: 24.07.2023, 02.08.2023, 29.09.2023, 13.12.2023
Judgment on	: 18.12.2023.

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and orderof conviction dated 22.08.2000 passed by the Learned Sessions Judge and Special Judge, 1st Court, Howrah under Section 409 of Indian Penal Code in Special Case No. 17 of 1997, arising out of Golabari P.S. Case No. 28 dated 22.05.81 whereby convicting the appellant to suffer simple imprisonment for 3 years along with a fine of Rs. 10,000/- and in default simple imprisonment for 6 months more.

2. The prosecution case emanated on the basis of a letter replicated as follows :-

"The letter dated 22.5.1981 from the 'The Divisional Officer, 'E' Division, West Bengal Fire Services" to "The Officer-in-Charge, Golabari P.S., Howrah" states as follows:

In my capacity as Divisional Officer, 'E' Division, West Bengal Fire Sevices, Government of West Bengal having its office at 430, G.T. Road(N), Howrah, P.S. Golabari and being duly empowered under the law so to do, I lodge this written complaint against Shri Prasanta Kumar Chakraborty, Cashier (now under suspension) attached to 'E' Division, West Bengal Fire Services.

There is a prima facie case against the said Shri Prasanta Kumar Chakraborty that he committed criminal misappropriation of a sum of Rs. 22,000/- (Rupees Twenty two thousand) approximately during the months of October and November'80 while having custody of the said amount of money in course of performance of his duties as Cashier 'E' Division at the Office at 430, G.T. Road(N), Howrah, P.S. Golabari. The criminal misappropriation took place in the following manner :-

Shir Chakraborty was instructed with his job-duty to disburse monthly salaries to staff including obtaining custody of deductions from the salary bills from a section of the empleyees of the Fire Services who are loanees from the Police Co-operative Credit Society, Lal Bazar and the said Cashier in the above manner obtained custody of an amount to the extent of Rs. 22,000/- (Rupees twenty two thousand) approx. shown deducted as side deduction in the salary bills from the employees of the Fire Services for the months of September and October'80 ….. in October and November, 1980 respectively.

As per usual practice, the said Cashier should have deposited the amount of loan instalments recovered from the pay bills of September'80 by the 15th day of October'80 and the instalments recovered from the pay *bills of October'80 by the 15th day of November'80. This deposit is required to be made at the Cash counter of the Lal Bazar Police Co-operative Society and Banking Ltd. But instead of making such deposit, the said Cashier Shri Chakraborty kept with himself the collected amount of Rs. 22,000/- approximately and the said amount was dishonestly and fraudulently misappropriated by him.*

As soon as the defalcation was detected, Shri Chakrabory was asked to show cause why disciplinary action apart from prosecution under criminal law should not be started against him. In reply, Shri Chakraborty in a letter dated 17.1.81 has virtually admitted having misappropriated the above sum and sought six months time to make good the loss.

So he is palpably guilty both under Section 409 of Indian Penal Code and also under Section 5 of the Prevention of Corruption Act. Shir Chakraborty has since been placed under suspension and sanction already obtained from the Government to proceed against the accused.

So it is prayed that you will take cognizance of the complaint by treating this letter of complaint and F.I.R. an investigate into the matter so that the as alleged accused is brought to book under the law."

3. Based on the aforesaid complaint letter Golabari Police Station case no. 28 dated 22/5/81 under Section 409 of the Indian Penal Code was registered investigation ensued which culminated in submission of Charge Sheet.

4. Charges were framed to which the appellant pleaded not to be guilty and claimed to be tried.

5. The prosecution in order to prove its case cited 16 witnesses and exhibited certain documents.

6. Learned Advocate for the appellant submitted that –

i. The Learned Judge erred in law by awarding punishment without any cogent reason and no case against the accused appellant has been proved.

ii. The Learned Judge erred in law by holding the accused/appellant as guilty of the offence wherein none of the witness could establish that the accused is the person responsible for collection and disbursement.

iii. The Learned Judge erred in law by not accepting the defence that the accused being the cashier is only to receive and pay the amount having no power and authority to take any decision for payment or disbursement independently nor a person responsible for remitting any amount to any other account or to any person or authority.

iv. The Learned Judge erred in law by not accepting the defence that the accused person being cashier is not the person responsible for the payments of the amount to the co-operative society, therefore he cannot be held responsible for committing offence.

v. The Learned Judge erred in law by holding the accused person guilty without appreciating that the accused is not at all liable for payment of amount to the co-operative society and such amounts have been misappropriated by some other person.

vi. The Learned Judge came to an erroneous finding holding that the accused person deducted money and accepts it is his custody without appreciating the real transaction that the accounts department prepares the salary bill with all deduction with an instruction to pay the deducted amount only.

vii. The Learned Judge made an erroneous finding that by holding the accused person guilty of offence without considering that the cashier is entrusted with the funds lying with him and to give accounts for that and he assessed that the payments have been made and that accounts had been given to higher authority.

viii. The Learned Judge failed to appreciate that most of the witness had no personal knowledge about the charge leveled against the accused/appellant.

ix. The Learned Judge failed to appreciate that the documents seized were not produced during the trial by the Investigating Officer specially when the same was deposed by the witnesses.

x. The Learned Judge failed to appreciate the defence case specially those deposed by the witnesses in cross-examination.

xi. The Learned Judge failed to appreciate that most of the witnesses were not member of the co-operative and were not interrogated by the Investigating Officer.

xii. The Learned Judge erred in law by not accepting fact that statement to a police official is no admission.

xiii. The Learned Judge failed to appreciate that no sanction was obtained from the competent authority before proceeding against the accused/appellant.

xiv. The Learned Judge erred in law while arriving at the quantum of money involved while holding the accused/appellant as guilty of the offence.

7. The Learned Advocate for the appellant further submitted that –

i. From the testimonies of the witnesses, it would be evident that no original document including the Seizure List were produced before the Court. The Order of conviction and sentence was on the basis of secondary evidence which was admitted without complying with the statutory formalities as envisaged under Sections 64/65 of the Indian Evidence Act, 1872 (Evidence Act). The fulcrum of the prosecution case being the letter of admission of the appellant (since deceased) which was marked as Ext.2 (with objection) is again a photocopy copy. It is trite law that secondary evidence can only be read into evidence provided the pre-conditions for admission thereof are satisfied. In the instant case, those pre-conditions were not satisfied as would be evident from the testimony of the PW2. Therefore, the photocopy copy of Ext.2 is inadmissible and cannot be relied upon. [Vide Jagmail Singh & Anr. Vs. Karamjit Singh & Ors., 2020(5) SCC 178 (Para 11, 12)]

ii. From the evidence on record, it would be evident that save and except the alleged admission of the appellant (since deceased) which was marked as Ext.2 (with objection), there is no other foundational evidence on which an order of conviction and sentence could have been passed. The learned Trial Judge has also relied upon on such admission and passed the order of conviction and sentence on the basis thereof.

Law is settled that an admission is a corroborative piece of evidence. Therefore, by no stretch of imagination, the same can be treated as the foundational stone for conviction.

iii. That apart the alleged letter of admission which was marked as Ext.2(with objection) was not admitted in evidence as the "object to part" was not removed. In light of the law laid down by the Apex Court it was the duty of the parties against whom objection was raised to remove the objection at the time of final argument. In the instant case, since the objection was not removed, therefore, the alleged Ext.2 could not have been read into evidence. [Vide: Bipin Shantilal Panchal vs. State of Gujarat reported in (2001) 3 SCC 1]

iv. There is no gainsaying that a cashier by virtue of his post is obligated to take care of the cash deposits, etc. However, mere dereliction of such function may entail a disciplinary proceeding but no criminal prosecution. The quint essential of Section 409 of the IPC are as follows:

a) The person must be entrusted with property; and
b) That person must commit breach of trust in respect of that properly;

The aforesaid two conditions are conjunctive. In order to constitute an offence under Section 409 of the IPC, both the aforesaid ingredients are to be satisfied. Mere entrustment of a property will not necessarily entail misappropriation thereof. Therefore, in absence of clear evidence of misappropriation, no charge under Section 409 of the IPC can be said to have been committed.

In the present case, from the testimonies of the witnesses as narrated hereinabove, the following striking features emerge:

i. No original document was produced in support of the claim of any witness;
ii. No allegation of misappropriation;
iii. The appellant (since deceased) was presumed by the witnessesto be liable as he was the cashier;
iv. There is no direct evidence qua misappropriation of property by the appellant (since deceased);

In view of the scanty evidence as surfaced out during trial, the charge under Section 409 of the IPC cannot be said to have been satisfied. Therefore, the order of conviction and sentence under Section 409 of the IPC is bad in the eye of law.

The Learned Advocate for the appellant relied on the citations as follows:

1. Kailash Kumar Sanwatia Vs State of Bihar &Anr. (2003) 7 SCC 399;
2. State of Maharashtra v. Mohan Radhakrishna Pednekar, 1998 Cr L J 3771 (Bom/DB)

The appellant (since deceased) was the unfortunate party to suffer the consequence of this laconic impugned order of conviction and sentence. However, the representative namely, Gita Rani Chakraborty peruses this appeal in order to remove the scar on the character of the appellant (since deceased) and to ensure the disbursement of retirement benefit which are due to the representative of the appellant (since deceased). Hence, the impugned order of conviction and sentence is required to be set at naught regard being had to the fact that the case was initiated in 1981.

8. The Learned Advocate for the State submitted that the document were marked as Ext. which were not objected to. The said document reveal the involvement of the appellant in the commission of the offence. The prosecution has been able to prove its case and appeal shall be dismissed.
9. A circumspection of the prosecution witnesses revealed as follows:
   i. PW-1 was declared hostile by the prosecution. He testified that he did not know the appellant (since deceased) and sent the deducted amount of the loanee member to Lalbazar.
   ii. PW-2 in his examination chief testified that some of the office employees were members of Calcutta Police Cooperative Credit Society and Banking Ltd. (Cooperative Society). It was further added that sometimes the appellant (since deceased) being the Cashier of the office used to deduct monthly instalments towards recovery of the loan of the members of the Cooperative Society. He testified that the appellant (since deceased) has admitted his guilt which was written by PW2 which was also signed by the appellant (since deceased). (Ext. 2) (with objection). Carbon copy of the said writing was exhibited before the court with objection.

      PW-2 in his cross examination stated that one key of the vault was kept in the custody of DDP and the other was in the custody of the cashier. PW2 could not say whether at the time of handing over of charge, if cash was intact. He further could not say if the money of the Co operative Society was deposited or not. PW2 was never interrogated by the Investigating Officer.

iii. PW-3 in his examination-in-chief testified that he took loan from the Cooperative Society many times. He further stated that the deductions were made in September-October 1980 from his salary bill for recovery of loan and it was kept in the custody of the cashier.

PW-3 in his cross examination could not remember his loan account number with the Cooperative Society. Nor could he produce any document to show that he had paid the same from his account. PW3 could neither produce the salary bill wherefrom money was allegedly deduced. He further deposed that the Co-operative Society did not send any notice/letter thereby asking him for refund of loan. He could not say anything about the Co-operative Society.

iv. P.W-4 in his examination-in-chief, stated that he took loan from the Co-operative Society for his sister's marriage. It was further stated that deduction were made in September-October 1980.

In cross-examination, PW-4 could not say whether any person could deposit any money directly to the Co-operative Society. He could not say his membership number, etc. No document was produced by the PW-4.

v. PW-5 in his examination-in-chief, PW-5 stated that the members of Co-operative Society were entitled to get loan and in order to realize loans, PW-5 used to send demand list to the respective officer for deduction from the salary. It was further stated that the concerned DDO used to deduct montly installment towards recovery of loan amount from the concerned loanees from their respective monthly salary.

In cross-examination,PW-5 testified that documents so seized during investigation were not produced before the Court. Nor could PW-5 see the letter which the PW-5 had sent regarding non-payment of loans. PW-5 could not produce any document in support of non-payment of loan.

vi. PW-6 in his examination-in-chief testified that he took loan from the Co-operative Society for his sister's marriage. He further testified that deductions were made from his salary and the same was kept with the appellant(since deceased).

In cross-examination,PW-6 testified that he did not remember his account number in the Co-operative Society and he had no document in support of his loan. Furthermore, PW-5 testified that he could not produce any document to establish that the deposits had been made to the Co-operative Society. PW-6 testified that he could not remember whether he had any document to prove that the said payment was deducted from his salary bill.

vii. PW-7 in his examination-in-chief testified that he took loan from the Co-operative Society. Deduction were made in September-October

1980. After deductions, moneys were kept in the custody of the appellant (since deceased). Subsequently,PW-7 had learnt that the deducted money was not deposited with the Co-operative Society.

In cross-examination, PW-7 could not produce any document to show that he had taken loan at the relevant period. Nor could PW-7 show that he was a member of the Co-operative Society. PW-7 could not produce any document in support of his contention.

viii. PW-8 in his examination-in-chief testified that it was his duty to disburse salaries of the employees as per the list prepared by 'E' Division.

In the cross-examination, PW-8 testified that he was not the drawing officer but he used to perform the said function. He further submitted that no one complained to him about the non-deposit of payment of loan amount.

ix. PW-9 in his examination-in-chief testified that he was the Disbursing Officer. He further stated that he had no knowledge whether the deducted amount of the loan from the salary accounts were deposited with the Co-operative Society. (This witness was never declared to be hostile).

x. PW-10 in his examination-in-chief testified that he had no personal knowledge as to in whose custody the deducted amounts were used to be kept.

xi. PW-11 in his examination-in-chief testified that he received an information that the amount so deducted from the Liluah employees of Howrah 'E' Division in September-October 1980 had not been deposited.

In cross-examination PW-11 testified that Bimalendu Debnath was in-charge of the supervision of all works including disbursement of salary amount.

xii. PW-12 in his cross-examination testified that he did not find Cash Book which was seized and kept in his zimmanama.

xiii. PW-13 in his examination-in-chief stated that he knew the appellant (since deceased).

xiv. PW-15 in his cross-examination testified that the specified amount so defalcated was not stated by anyone other that PW-1 (who was declared hostile). PW-15 could not find the seized documents in Court. He did not ascertain the number of members of the Co-operative Society. He admitted that there was overwriting in the Seizure List. He further admitted that he did not find the Seizure List, Carbon copies of which were marked as Ext. 3/B, 3/C and 3/D.

xv. PW-16 in his cross-examination had admitted that he did not visit the Co-operative Society.

10. 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."

11. 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).*
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> ***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:*
>
> *(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;*

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

(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.

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."*

12. 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,*

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

(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……………….

***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."*

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

[3] (1974) 4 SCC 230

"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.......................*

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."*

14. 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 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

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[4] 1962 SCC OnLine SC 83

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)”

15. PW-2 in his evidence stated that the appellant used to deduct the monthly recovery installments in his custody and thereafter used to remit the same from the said cooperative. At the relevant period, Sri Bimalendu Debnath was the divisional officer of the said office. He further stated that the appellant was suspended for admitting his guilt about misappropriation of the said money.
16. During his cross- examination, PW-2 stated that one key of the vault was kept in the custody of D.D.O. and another key was kept in the custody of the cashier. He further stated that the cooperative was not a government agency and it was formed by certain police staff. It appears from the deposition of PW-2 that the vault was not maintained by the appellant alone.
17. PW-3, in his cross-examination stated that there was no due in his cooperative society. He further stated to have withdrawn his due in the year 1991. He further stated that the said cooperative society did not send him any letter informing that they did not get the refund of the said loan by deductions. His deposition signifies the deduction from his salary bills were adjusted against the recovery of loan. The evidence of PW-4 did not specifically mention apart from a general allegation that the deducted money

was not sent by the appellant towards realization of his loan and the same was not supported by any document.

18. PW-5 stated to have joined the aforesaid cooperative society as a clerk to being a government employee. He could not produce any document in support of his allegations against the appellants. He further stated that he had no legal authority to lodge a complaint to the police.

19. PW-6, during his cross-examination stated that he did not remember the account number of the said cooperative credit society and he had no document relating to the said cooperative society. He further stated that "*No amount was deposited to the said cooperative society. We do not deposit any amount and do not withdraw any money and do not withdraw any money but we get amount by cheque and deductions are made from our salaries towards repayments. No document is required to be kept in our custody". The said co-operative is the police co-operative. Police service men and fire service men are not the same. I cannot say whether the said co-op. society was registered. I did not file any written complaint to anyone but I told it to accused Prasanta Babu. I do not remember if I have any documents to prove that the said repayment was deducted from my salary bills. Mr. P. Debnath was our the then D.D.O. I do not know his full name."*

20. PW-7 stated that *"I am not a member of the said Co-op. credit society. I cannot produce any document to show that I took money at the relevant period from the aforesaid co-op. credit society. My number was 21709. I cannot show any document that I was a member of that co-op. credit society. I withdrew my*

membership after repayment of money. To become a member one has to apply and deposit 6.50 and a receipt was granted but the said receipt is not with me. The employees of the said co-op. were not government employees."

21. During cross-examination, PW-7 stated that *"We have no complaint against Prasanta Chakraborty."*

22. PW-8 in his cross-examination stated that *"I was not the Drawing Officer but it was the convention that as officer-in-charge, for the convenience of the staff, the cashier use to send net salaries for disbursement to the staff as per list. I used to perform the said function. We used to return the pay-sheet after disbursing to the Divisional Fire Officer. There are many fire service station under 'E' Division. I cannot say the full name of the said Co.-operative. I cannot say the full name of the said Co. Operative. I cannot say where the main officer of the said co-operative society is situated. None complaint to me regarding non-deposit of loans repayments complains as are to be made in the main office. I was not examined by the I/O."*

23. PW-9 stated that *"I have got no knowledge whether the deducted amount of the loan from the loanee employee from the salary for the month of Sept. and Oct. '80 was sent to the Calcutta police co-op society Ltd."*

24. During cross-examination, PW-9 stated that "*Calcutta Police co-op credit society is a separate organization and they have separate employees. This organization is a semi government organization under co-op rules. I have got no knowledge whether the co-op employees gets any pension. Bimalendu Debnath was the disbursing officer of Howrah Division. I cannot say the*

registration number of Calcutta Police co-op credit society. No acquaintance role of the employees of Howrah Fire Service Station for the month of Sept. and Oct. 1980 was seized from me."

25. PW-10 stated that *"Since 1980 till my retirement I was station officer of the Liluah fire station. I used to act as the disbursing officer on behalf of divisional fire officer. I disbursed the amount of salary for the month of Sept. and Oct. 1980 of the employees of fire service. The system of disbursing the salary was that the net amount to be disbursed for the employees of Liluah Fire Station used to have been received from the Divisional Fire Office at Howrah and the net amount are disbursed to the employees of Liluah Fire Station. All the deductable amount including the amount to be deducted to the repayment of the loan of Calcutta Police cooperative credit society used to have been deducted in the divisional office. I have got no personal knowledge as to in whose custody the deducted amount used to have been kept."*

26. The evidence of the prosecution witnesses did not corroborate each other. The role of the appellant merely as a cashier to maintain the books of accounts did not establish any of entrustment of the disputed sum of money and its consequent misappropriation by the appellant for his wrongful gain. Majority of the prosecution witnesses viz. PW-5, PW-6, PW-7 as cited above could not specifically state as to the particular aspect in which the offence was committed by the appellant. Moreover ignorance and unawareness was cited.

27. The appellant during his examination under Section 313 Cr.P.C. stated himself to be the cashier who apprised the cash to the Divisional Officer in full.
28. Sanction was not obtained from the concerned authority. The Investigating Officer did not visit the office where the appellant was functioning at the time of the alleged incident.
29. The seized documents comprising of the cash books and the bills marked as exhibits were self explicit which did not project the deductions of loan amount to have been misappropriated by the appellant.
30. 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.
31. Under such facts and circumstances, the judgment and order of conviction dated 22.08.2000 passed by the Learned Sessions Judge and Special Judge, 1st Court, Howrah under Section 409 of Indian Penal Code in Special Case No. 17 of 1997, arising out of Golabari P.S. Case No. 28 dated 22.05.81 whereby convicting the appellant to suffer simple imprisonment for 3 years along with a fine of Rs. 10,000/- and in default simple imprisonment for 6 months more is set aside.
32. The instant criminal appeal being CRA 271 of 2000 stands disposed of.
33. There is no order as to cost.
34. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

35. 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.)