IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay.

CRR 1804 of 2013

Sk. Nepal @ Napal @ Sk. Ansar
Vs.
The State of West Bengal & Anr.

For the petitioner	:	Mr. Debabrata Acharyya Mr. Sital Samanta
For the State	:	Mr. Narayan Prasad Agarwala Mr. Pratick Bose.
Heard on	:	13.01.2023
Judgement on	:	17.03.2023

ANANYA BANDYOPADHYAY, J.:

1. A complaint dated 27.02.2009 was filed before the I.C Bagnan Police station, Howrah by the complainant opposite party no 2 which precisely stated the purchase of a bus being no WB 117739 from one Smt. Rina Santra for Rs 3,90,000 by the complainant on 2nd June, 2003 which used to ply on Bagnan Manpur Road. The complainant sold the aforesaid bus in the year 2006 being incapacitated to commute. On 28.02.2007 the complainant purchased another bus being no WB 11A – 0187 at a price of Rs 3,50,000 from Saidul Islam Mallick and Abdul Hai Mallick which plied in the route of Howrah Bakshi L1. Due to certain mechanical problems of the bus, the complainant expressed her desire to dispose of the said bus. Consequently, one Sekh Nepal came to her house. On discussion with Sekh Nepal, the complainant and her husband in good faith agreed to sell off the bus at a price of Rs 3,00,000 and accordingly asked to transmit the bus at the petrol pump of Tara Ghosh at Chandrapur in the afternoon of 29.09.2008. The driver of the complainant drove the bus to the petrol pump and the complainant and her husband reached the said place at about 5 – 5.30 pm. Sekh Nepal spoke on his mobile to somebody on phone at a distance from the complainant and told him to reach the petrol pump the following morning when the intending purchaser would arrive to purchase the bus and suggested to leave the bus at the petrol pump. Sekh Nepal made the husband of the complainant sign on a non judicial stamp and certain papers. The complainant was made to sign on the reverse of the Xerox copy of her voter I card and collected the papers of the earlier bus no.WB 117739 and WB

11A – 0187. The complainant and her husband relying on the statements of Sekh Nepal returned home.

2. On 30.09.2008 at about 7 – 7.30 pm the complainant reached the petrol pump and did not find the bus. She searched for it. She called Sekh Nepal on phone and learnt that he had shifted the bus to another place. Sekh Nepal tempered the engine and chassis no of the old bus into the bus to be sold by him. Sekh Nepal thereafter sold the bus being no WB 11A – 0187 and had utilized the entire money himself. He was trying to blackmail the complainant creating false documents on the basis of the signature of her husband on the papers.

3. The complainant later on came to learn that Sekh Nepal was a habitual offender and had defrauded other people taking advantage of their innocence, similarly he cheated the complainant and grabbed Rs 3,00,000 from them. The complainant further stated Sekh Nepal informed them to repay the amount received after selling the bus which was the reason for delay to lodge the complainant.

4. The Learned Advocate for the petitioner Mr. Debabrata Acharyya submitted that the petitioner was falsely implicated in the instant case with the charges under Sections 406/379 of the Indian Penal Code. He further submitted that the petitioner did not take the bus from the possession of the complainant.

The bus was never entrusted to the custody of the petitioner and the same was not mentioned in the complaint. The complaint was filed after a lapse of five months from the date of alleged occurrence with an ulterior motive to falsely implicate the petitioner in the instant case as the entrustment of the property and misappropriation of the same do not constitute the offence of theft and therefore the proceeding pending before the Trial Court should be quashed.

5. The Learned Advocate for the State Mr. Narayan Prasad Agarwala submitted presence of sufficient materials in the case diary to implicate the petitioner and the alleged offence committed by the petitioner can be determined on conclusion of trial on adducing evidence. Therefore the revisional application should be dismissed.

6. **Section 378 in The Indian Penal Code states :-**

"Theft.—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of *being the subject of theft as soon as it is severed from the earth.*

Explanation 2.—A moving effected by the same act which affects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as

A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent. A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A, being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of the warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the highroad, not in the possession of any person. A by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweler, to be regulated. Z carries it to his shop. A, not owing to the jeweler any debt for which the jeweler might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he

may have committed criminal trespass and assault, has not committed theft, in as much as what he did was not done dishonestly.

(j) *If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, in as much as he takes it dishonestly.*

(k) *Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property in as much as he takes it dishonestly.*

(l) *A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.*

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives a valuable property, which A knows to belong to her husband Z, and to be such property as she has no authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft."

7. **<u>Section 405 in The Indian Penal Code states :-</u>**

> *"Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".*
>
> *[Explanation 2[1].—A person, being an employer 3[of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the*

time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

[Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriate them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the direction and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it

will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust."

In the instant case the complainant in her complaint dated 22.02.2009 stated that the petitioner had promised to pay her the sale proceeds of the bus i.e. Rs. 3,00,000 which did not prompt her to lodge the complaint against the petitioner on the appropriate date of her knowledge about the alleged occurrence of the incident which in itself amounts to a violation of contract between the parties.

8. The statements recorded under Section 161 of Criminal Procedure Code appearing in page no 5 and 6 of the case diary produced by the Learned Advocate for the State revealed the space in the petrol pump after its closure was utilized in stationing of several buses. The bus no. WB11A-0187 being one of those vehicles. The independent witnesses' statements recorded under Section 161 of CrPC appearing in page no 5 and 6 of the case diary revealed their ignorance about the whereabouts of the bus and whether it was stolen or taken away by somebody.

9. A criminal proceeding cannot be allowed to continue in absence of cogent materials to implicate any person based on suspicion. The case diary does not reveal any eye witness to have seen the petitioner to illegally take possession of the bus. The elements to constitute an offence under Sections 379/406 of IPC are absent. The bus in question being no. WB11A –

0187 was not recovered by the police prior to the submission of the charge sheet.

10. From the facts of the case it appears that the dispute between the parties is concerned with the amount of money to be paid on account of sale of the bus in question as has been stated in the complaint itself that the complainant delayed to lodge the complaint on the promise of the petitioner to pay her the amount of Rs. 3,00,000.

11. Under such circumstances in absence of specific averment in the complaint in order to justify the commission of the offence by the petitioner to continue with the proceedings before the Trial Court would be to abuse the process of law.

12. Accordingly, the criminal revisional application being CRR 1804 of 2014 is allowed.

13. The proceedings being G.R. Case No. 225 of 2009 arising out of Bagnan P.S. Case No. 53 of 2009 dated 22.02.2009 under Sections 379/406 of the Indian Penal Code pending before the Court of the learned Additional Chief Judicial Magistrate, Uluberia, Howrah is accordingly quashed.

14. Connected application if any is also disposed of accordingly.

15. Case diary be returned to the learned advocate for the State.

16. There is no order as to cost.

17. Let the copy of this judgment be sent to the learned trial court as well as the police station concerned for necessary information and compliance.

18. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(**ANANYA BANDYOPADHYAY, J.**)