IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

G.A. 11 of 1981

The State of West Bengal
-Vs-
Bharantimoy Chatterjee & Anr.

For the Appellant/State	: Mr. Narayan Prasad Agarwala
For the Opposite Parties (Amicus Curiae)	: Ms. Pallavi Priyadarshee
Heard on	: 27.02.2024, 06.05.2024
Judgment on	: 31.07.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of acquittal dated 29.11.1980 passed by the Learned Metropolitan Magistrate, 3rd Court, Calcutta acquitting the opposite parties of the charge under Sections 406/120B of the Indian Penal Code in G.R. 524 of 1972 of the said Court.

2. The prosecution case originated from on the basis of a complaint filed by a Sub-Inspector of the District Distribution of Procurement and Supply also being the Secretary of the Food Directorate Employees Co-operative Society Ltd., 11-A Free School Street, Calcutta. Followed by an investigation and submission of charge-sheet by the police, the opposite party no. 1, the Treasurer of the Society and opposite party no. 2, the Secretary faced trial

before the Learned Metropolitan Magistrate upon charges under Sections 406/120B of the Indian Penal Code.

3. The charges, inter alia, against the opposite parties were that between 01.07.66 and 16.10.68, the opposite parties no. 1 and 2, Treasurer and Secretary respectively of the Society committed criminal breach of trust concerning the fund of the Society, amounting to Rs.34,354.83 Paisa only, being in dominion over it, in furtherance of a criminal conspiracy between them to embezzle the said fund.
4. The opposite parties pleaded innocence to the charges and claimed to be tried.
5. The opposite party no. 2 defended the opposite party no. 1 alone to be responsible for the defalcated amount. The opposite party no. 2 was absolved of the charges by the Appellate Authority in the arbitration proceedings, except that he was directed to reimburse a sum of Rs.250/- only, being an unauthorized disbursement.
6. The prosecution examined 13 witnesses including the Investigating Police Officer and exhibited certain documents.
7. The Learned Advocate for the appellant/State submitted as follows :-
    i. The purported findings of the arbitration proceedings were wholly inadmissible in the present prosecution.
    ii. Evidences of the entries in the Cash Book, all countersigned by the opposite parties in reference to the receipts and the vouchers were ignored and it was wrongly held that non-production of the same had an adverse presumption against the prosecution case.

iii. Evidences were considered in piece-meal as to the amount of defalcation appeared to be contradictory.

iv. The oral and documentary evidence clearly established the charges against the accused beyond reasonable doubt.

v. The failure of the accuseds to account for the money proved to have been received by them or their failure to pay them on demand clearly established that they dishonestly misappropriated or converted to their own use the same, which the Learned Magistrate failed entirely to consider and appreciate.

8. Considered the rival contention of Learned Amicus Curiae.

9. PW-1 Godadhar Ghosh, the complainant, in his evidence stated as follows:-

a) "The accused persons did not hand over any Account Books, Cash Book etc. to us. We then asked the accused Samaresh to make over charges to us by our letter dated 4.11.68 marked Exhibit-2 .... According to his oral directions we took over charge from the accused on 17.7.69."

b) "By our letter dated 18.7.69, we demanded the said Cash Balance from the accused (marked Exhibit 6) is Treasurer and Secretary."

c) "Cash in hand upto 15.10.68 amounted to Rs.43,600/38 out of that we received on 16.1068 and 22.1.68 Rs.9671/- and nothing more. We got no further amounts about the balance money."

10. PW-2 Binoyendra Nath Mondal stated as follows:-

a) *"I received Rs.9000/- from Bharantimoy Chatterjee the then out-going Treasurer on 2.1.68, he also handed over Rs.570/- to me. But formal charge was not even then make over to me."*

b) *"We received no Cash Books or Account Book from the out – "I verified Ledger Receipts and Cash Book."*

c) *"I have found the irregularities in the Accounts with reference Treasurer's advice."*

11. PW-6 Amulya Kumar Mitra, who was appointed the Auditor to audit the accounts proved his report Exhibit-26 and also stated in his evidence as follows:-

a) *"I found after auditing that there was defalcation in respect of Rs.33569.68 …. Besides I found receipts of Rs.161/- issued without any corresponding entry in the cash Book".*

b) *"I also found that the accused deposited in excess Rs.278.70 and in short Rs.912.85. The total amount of defalcation is Rs.34,354.93. I have shown in details".*

c) *"After audit it was detected that a sum of Rs.34,354.83 paise was defalcated during the audited period from 1966-67 to 1968-69".*

d) *"Our Co-operative begins on 1st July and ends on 30th June. This is the Bye-law of our society Ex.".*

e) *"They used to control the finance of the Society. The accused operated the Account at the New Market Post Office. They used to draw money from the Postal Account by their joint signatures …. this*

Cash Book is written by accused Bharantimoy Chatterjee, Exhibit-15. The accused persons signed all the pages of the Cash Book".

12. PW-7 Sudhanshu Kumar Chakrabarty in his evidence stated as follows:-

    a) "Accused No. 1 Bharantimoy Babu wrote on 19.8.69 admitting that a portion of the Society fund was lying with him. This is that letter Exhibit 9".

    b) "As per Rule 35 of the bye laws the fund of the Society shall be in the custody of the Treasurer ... Cash Book is maintained by the Treasurer".

13. The Hon'ble Supreme Court in ***Deepak Gaba v. State of U.P.***[1] held the following:-

> ***"14.*** *Section 406IPC ["**406. Punishment for criminal breach of trust**.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."] prescribes punishment for breach of trust which may extend to three years or with fine or with both, when ingredients of Section 405IPC are satisfied. For Section 406IPC to get attracted, there must be criminal breach of trust in terms of Section 405IPC. ["**405. 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 wilfully suffers any other person so to do, commits "criminal breach of trust".***Illustrations***(b) A is a warehouse-*

[1](2023) 3 SCC 423

*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 directions 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, thought 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.***(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."(Explanations 1 and 2 and Illustrations (a) and (e) to Section 405IPC are excluded, as they are irrelevant.)]*

15. *For Section 405IPC to be attracted, the following have to be established:*

(a) the accused was entrusted with property, or entrusted with dominion over property;

(b) the accused had dishonestly misappropriated or converted to their own use that property, or dishonestly used or disposed of that property or wilfully suffer any other person to do so; and

(c) such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

> ***16.*** *Thus, criminal breach of trust would, inter alia, mean using or disposing of the property by a person who is entrusted with or otherwise has dominion. Such an act must not only be done dishonestly, but also in violation of any direction of law or any contract express or implied relating to carrying out the trust. [Sudhir Shantilal Mehta v. CBI, (2009) 8 SCC 1 : (2009) 3 SCC (Cri) 646]"*

14. The conspectus of the prosecution evidence as stated above referred to Exhibit-6, a letter dated 18.07.1969, demanding a Cash Balance. The evidence of PW-6, the Auditor's report marked Exhibit-26 was the fulcrum of the prosecution case. PW-1, one of the Directors of the Co-operative Society stated the audit report to be confirmed source of information as to defalcation.
15. The Auditor's report indicated the Cash Book marked as Exhibit-5. The Auditor's report did not disclose uncontrovertable evidence to establish embezzlement or misappropriation of money by the opposite parties. The prosecution did not produce receipt to demonstrate actual collection of money.
16. PW-2, the member of the Co-operative Society and also the Treasurer of the same from 16.10.1965 to March, 1970, in his cross-examination deposed they used to maintain receipts against all collections and vouchers against all expenditures. However, such voucher receipts referred to in the Cash Book denoting all the entries were not produced before the Court which were the vital documents to be scrutinized to establish the credibility and veracity of the Cash Book.

17. The evidence adduced by the PW-4 and 6 had been inconsistent. The evidence of PW-9 further evinced the fact of Sushil Roy to deal with the cash apart from the accused persons Sushil Roy was not cited as a witness.
18. There had been contradictions, anomalies and material deficiencies in both the oral and documentary evidences adduced by the prosecution. In order to indict a person under Sections 406/120B of the Indian Penal Code, it was incumbent upon the prosecution to prove the knowledge and intent of entrustment for misappropriation for sub-serving guilty motive.
19. The prosecution apart from producing certain calculations could not cite an iota of evidence to incriminate the accused persons.
20. In view of the above discussions, the instant appeal being GA 11 of 1981 is dismissed.
21. There is no order as to costs.
22. I record my appreciation for the able assistance rendered by Ms. Pallavi Priyadarshee, Learned Advocate as Amicus Curiae in disposing of the appeal.
23. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
24. 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.)