

Form No.J(1)

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

Present : The Hon'ble Justice Indrajit Chatterjee

C.R.A. 323 of 2013

Rohini Kumar Jana

-vs.-

The State of West Bengal

For the Appellant : Mr. Rajdeep Majumder

For the Respondent : Mrs. Rituparna Ghosh.

Heard on : 21.8.2015

Judgement on : 03.09.2015

Indrajit Chatterjee, J. :

This appeal has been directed as against the judgement and order of conviction dated 24-04-2013 and 25-04-2013 as passed by the learned Judge, Special Court, within the district of Purba Medinipur, in Special Trial No. 31 of 2007 in which learned trial court was pleased to convict this accused appellant in respect of the charge punishable under Section 409 of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for four years with

fine of Rs.1000/- and in default of payment of fine, he was further directed to suffer simple imprisonment for one month.

The case before the learned trial court which I get from the judgement of the said court can be stated in brief thus :-

That one written complaint was lodged by the Block Development Officer, Patashpur-II Block on 24-12-2002 with the Officer-in-Charge of Patashpur Police Station, District – Purba Medinipur to the effect that the Headmaster of Baharda Jagannath Primary School, i.e., the appellant before this court had misappropriated the government money given to him for construction of the court building.

On receipt of the F.I.R., Patashpur P.S. Case No. 1 of 2003 dated 04.01.2003 was registered under Section 409 of the Indian Penal Code. It was the prosecution case that Patashpur II Panchayet Samity sanctioned Rs.60,000/-for construction of school building of Baharda Primary School and sent a letter to the Headmaster and Pradhan of Khar Gram Panchayet for opening a joint account and the joint account bearing no.3032 was accordingly opened with the Mallabhum Gramin Bank, Kharaigar Branch by the said Headmaster (the appellant) and Ranjit Mondal, Pradhan of Khar Gram Panchayet who were the joint operators of the said account. It was further

mentioned in the F.I.R. that at first Rs.30,000/- was sanctioned and the appellant vide cheque no.707109 dated 11-02-1997 deposited that cheque dated 11-02-1997 through voucher no. 203 in that account no. 3032 and in that account Rs.29,890/- was credited after deducting the collection charge. As per the statement of accounts of the bank marked as Ext. 4, out of that amount Rs.29,850/- was withdrawn on the same day, i.e. on 09-04-1997 on which date the same was credited to the bank after clearing. It is also the prosecution's case that the present appellant thereafter on 13-05-2002 deposited Rs.16,000/- in that joint account maintained for that building purpose and subsequently on 28-05-2010 he again withdrew Rs.10,000/-. As per the complaint the appellant was asked to submit the adjustment bill for Rs.30,000/- through letter but the said letter returned back with intimation that he was out of station.

The investigation was taken up by P.W.3, one S.I. Debidas Mukherjee, of Patashpur Police Station and during the course of investigation, he recorded the statement of the witnesses, held raid to apprehend the accused, sent the requisition to the Sub-Inspector of Schools of Protapligi, South Circle, Patashpur and also to the B.D.O. – II for supplying the documents. The B.D.O. Patashpur

forwarded a photocopy of the payment voucher, photocopy of the resolution of Baharda Primary School vide his office memo no. 385 dated 12-03-2003. The B.D.O. submitted a report which was marked as Ext.6. In course of investigation, the said Investigating Officer sent requisition to the Manager of the bank for production of cheque bearing no.707109 and after completion of investigation, the said Investigating Officer submitted the charge sheet for the offence under Section 409 of the Code before the S.D.J.M., Contai vide charge sheet no. 18/03.

The accused appellant could be apprehended only on 07-11-2005 and he was produced at first before the S.D.E.M., Egra of the same District and he was directed to be produced before the Additional Sessions Judge, Paschim Medinipur in Special Case No. 10/03 of the Special Judge, Medinipur (undivided). The case was transferred to the 3rd Special Court of the said District. Charge sheet was placed before that court on 12-02-2004 and cognizance was taken. Summon was ordered to be issued. Accused was produced on 14-11-2005 in custody. All these happened in Special Case No. 10/03. After the new district was created the case record was transferred to the District Judge, Purba Medinipur as per notification

no. 10157/R-Ins. Dated 20-12-2003 and ultimately it came to the present learned trial court. The trial started.

The charge was framed against the accused for the offence punishable 409 of the Code to which the accused pleaded not guilty and claimed to be tried. Before the trial court in all four witnesses were examined by the prosecution. Some documents were marked as exhibits. The defence did not adduce any oral and documentary evidence and the accused was examined under Section 313 Cr.P.C.

Thereafter before the learned Trial Court as many as four witnesses were examined out of eight charge-sheeted witness. It may be mentioned that Charge-sheeted witness 5 died during the course of trial. The witnesses examined by the prosecution are Ranjan Kr. Pal (PWI) who at that point of time was allegedly one clerk of the BDO office. PW 2 is Mihir Kr. Maity that is one bank official. PW-3 is Debidas Mukerjee, the I.O. of this case and PW-4 is Balai Bijuli.

On behalf of the prosecution several documents were marked as exhibits but I have failed to gather how Exhibit Nos. 3 & 5 were marked as exhibits. As per exhibit list exhibit 1/3 is the written complaint. There is no endorsement of any witness adduced by the prosecution who came to prove this exhibit 1/3. It may be mentioned that the said Block Development Officer who lodged complaint was

not examined. It is most surprising that the learned Trial Court marked on document as exhibit 6 which was purportedly one inquiry report of the said Block Development Officer. It is a settled principle of law that unless the person who conducted the inquiry is examined his report cannot be marked as exhibit. Similarly, in the instant case the FIR was not marked as exhibit. Only the signature of the B.D.O was marked as exhibit, through the evidence of PW-1.

The defence preferred not to adduce any oral and documentary evidence.

I have already stated regarding the result of this litigation wherein the present accused-appellant was found guilty in respect of the charge under section 409 of the code and the sentence imposed.

It was submitted by Mr. Rajdeep Majumder, learned advocate appearing on behalf of the defence, being appointed to defend this accused as per order of the court that in the instant case there was no entrustment of fund to this accused-appellant and as such there cannot be any conviction under section 409 of the code. He took me to Sections 405 and 409 of the code to establish his contention. He submitted that this accused appellant duly deposited Rs. 16,000/- on 13.05.2002 and also showed some photocopies of receipts to the I.O. regarding construction work done by him. Thus it was his

contention that there being no entrustment, there was no question of criminal misappropriation. He argued that accused-appellant be acquitted. He also submitted that the prosecution had failed to prove as to whether any amount was actually misappropriated.

On behalf of the prosecution it was submitted by Mrs. Ghosh, Advocate that examination of the B.D.O will not vitiate the trial. She took me to the ledger that is exhibit 4 to show that Rs. 29850/- was withdrawn by this accused- appellant. She also took me to the said ledger to show that this accused deposited in that account Rs. 16,000/- and thereafter also took out from that account Rs. 10,000/-. He submitted that if the conduct of the accused is verified then the intention of the accused will come out that he misappropriated the government money. It was her further argument that misappropriation of government fund whatever may be the amount is punishable under section 409 of the Code. She further submitted that this accused-appellant did not adduce any DW to prove that even a portion of school building was constructed by this appellant. He further submitted that DW 1 was declared hostile by the prosecution.

In reply it was submitted by Mr. Majumder that when the money was not misappropriated at all there was no question of

adducing any DW to prove in which way that money was spent. Let me now have a glimpse as to the evidence of record. I must say that this case was handled very badly both by the investigating agency, prosecuting agency and also by the learned Trial Court. The Cheque vide which Rs. 29850/- was withdrawn was not seized and naturally not marked as exhibit.

PW 1 deposed that at material point of time he was posted deep tubewell operator of Patashpur Block II and proving his signature of the Block Development Officer which were marked as exhibit 1 and 1/1. This witness identified the accused-appellant on block. He also deposed that as first instalment amounting to Rs. 30,000/- was given by cheque to the accused and he withdrew the cheque from the office of the said BDO and the cheque was in cash by the accused to the Mallabhum Gramin Bank. This witness also deposed that the accused did not spend Rs. 10,000/- for the purpose of development of the school out of Rs,30,000/-. This witness was thereafter declared hostile. It may be mentioned that as per the decisions of the apex Court the Court will accept only that portion of the evidence of a hostile witness to the extent it has supported the case of the prosecution. Thus as per his evidence Rs. 30,000/- were allotted and the said amount was withdrawn by this accused.

PW 2 was posted as Branch Manager of Mallabhum Gramin Bank of Kharai Bazar Branch and he proved exhibit 2 wherein he wrote to the I.O. that cheque no. 707109 was not issued by the said bank as against account no. 3032 dated 09.04.1997. This witness also deposed that the said account No. 3032 stood in the name of Bharda Jagannath Primary School and it was a joint account operated by Ranjit Mondal, Prodhan of Khar No. 3 Gram Panchayet and the person appellant being the Headmaster of that Baharda Primary School. It is also clear from his evidence that the said account was opened on 17.1.1995 and the copy of the application form was marked as exhibit 3. This witness further deposed that as per the ledger (exhibit 4) Rs. 29890/- was deposited by outstation cheque collection and on the same date a sum of Rs. 29850/- was withdrawn. This witness was cross-examined but there is nothing in the cross-examination worth discussion.

PW-3 is the I.O. of this case. He proved the formal FIR, endorsement of the formal FIR maker, that he held raid to apprehend the accused and sent requisitions to S.I. of schools of the relevant circle and also to BDO Patashpur 2 for supplying some documents like the Xerox copies of the payment vouchers and photo copies of the resolution book of Baharda Primary school. He also proved the

original copy of the report submitted by the BDO Patashpur dated 20.02.2003. I have already said that this report ought not to have been marked as exhibit without the BDO being examined. In his cross-examination he deposed that on 13.05.2002 this accused deposited Rs. 16,000/- in that bank account of the primary school but did not investigate as to how and why the said amount was deposited or what was the source of the money. He also deposed that the period of defalcation was in between 09.04.1997 to 28.05.2002. It was specifically claimed of the I.O. that sum of Rs. 30,000/- was defalcated during the said period.

Thus on scrutiny of the record it appears that this appellant practically handled that bank account no.3032 as if it was his personal account. It is clear from the evidence both oral and documentary and also the admission by this accused when he was examined under Section 313 Cr.P.C. that an amount of Rs.29,850/- was withdrawn by him. In 313 Cr.P.C. he claimed that it was withdrawn not only by him but also by the Pradhan of that Gram Panchayet Ranjit Mondal. It is apparent from the evidence on record that it was a joint account to be operated both by the accused Headmaster and by that Pradhan. It is apparent from the Ext.4 that Rs.16,000/- was deposited by cash. It is also apparent from the

cross examination of PW-3 about which I have already told that on 13.05.2002 the present appellant deposited that Rs.16,000/- in the bank account. Thus it was the positive case of this accused that he deposited Rs.16,000/- on 13.05.2002 even though as per Ext.4 that Rs.29,850 was withdrawn by a self cheque on 09.04.1997.

PW-4 is one Balai Bijuli who deposed that at the material point of time he was the member of the Baharda Gram Panchayet. This witness duly identified the accused and further deposed that Rs.30,000/- was granted for the development of that school during the year 2002. It is true that this witness further deposed that the present appellant being the Headmaster purchased material for construction of the school building and had shown him the purchase vouchers. He also deposed that he was not aware as to what happened thereafter as he was not a member of the Panchayet thereafter. He could not say the amount of the said vouchers. This witness was not examined by the IO. Thus this witness cannot be treated as a savior for the appellant.

In 313 Cr.P.C. the accused admitted that he withdrew Rs.29,890/- (sic) jointly with the Pradhan. He also admitted that Rs.30,000/- was sanctioned for first instalment. He also admitted that bank account no.3032 was opened as per joint declaration. He

also admitted that Rs.10,000/- was also withdrawn from that account but at the same time claimed that it was his personal money.

He was asked vide question no.13 as to whether Rs.29,890/- was deposited vide outstation cheque on 09.07.1987 and on that date the said amount was withdrawn. This witness answered to this question that "By deductions the amount of commission cash money was withdrawn". Defence did not adduce any oral evidence and also did not produce any document to prove how the money was utilized.

It is relevant here to quote both Sections 405 and 409 of the Code which respectively runs thus:

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 willfully suffers any other person so to do, commits "criminal breach of trust".

409. 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 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.

Thus Section 405 has defined criminal breach of trust. The main ingredients which the prosecution must prove in a case under Section 405 of the Code are as follows:-

- (1) The accused must be entrusted with property or with dominion over property;
- (2) The person so entrusted must-
 - (a) Dishonestly misappropriate or convert to his own use that property; or
 - (b) Dishonestly use or dispose of that property or willfully suffer any other person to do so-

- (i) In violation of any directions of law prescribing the mode in which such property is to be discharged;
- (ii) Any legal contract made touching the discharge of such trust.

Section 409 relates to criminal breach of trust by public servant or by banker the ingredients are as follows:

- (1) That the accused was either a public servant, a banker, a merchant, a factor or a broker or an attorney or an agent;
- (2) That as such he was entrusted with the property in question or with dominion over it;
- (3) That he committed criminal breach of trust in respect of it.

Thus considering the evidence both oral and documentary and admission on the part of the accused in his examination under Section 313 Cr.P.C. this Court is of the firm view that this accused who was the Headmaster of a primary school was duly entrusted with the Government money to the tune of Rs.29,850/- and he practically misappropriated the entire sum initially but later on good senses however prevailed on him and he deposited Rs.16,000/- on 13.05.2002, that is after a gap of roughly five years. This also shows his criminal intend to misappropriate the Government money.

Simply because he deposited a part of the Government money that cannot give any credit to the accused convict. The guilty mind of the convict cannot be absolved of the crime. Misappropriation of Government money whatever may be the amount and whatever may be the period is itself a punishable offence. This accused enjoyed even that 16,000/- for a period of five years for the purpose best known to him. He could not prove how he utilized the fund for the construction of the school building. This Court is not unmindful of the fact that only relying on the 313 Cr.P.C examination no person can be convicted but there must be some corroborative evidence. The oral and documentary evidence about which I have discussed in details will give necessary support to the admission on the part of the accused.

Thus this Court is satisfied that the accused misappropriated the Government money and practically used the said fund and the said bank account just like his personal bank account. It is the system that when a Government fund is disbursed through the Panchayet then the Panchayet Pradhan must be a signatory to the cheque. This may be treated practically as counter signature. It cannot said that the said money was withdrawn also by that Ranjit Mondal, the then Pradhan of that Gram Panchayet.

It is true that this case was very badly handled both by the investigating agency and also by the trial court. The court did not take any special endeavour to examine the de facto complainant, the Block Development Officer of Pataspur-II but who also submitted a report to the Officer-in-Charge of Pataspur Police Station, which was unfortunately marked as Ext.6 but that was totally to the contrary of the Evidence Act about which I have already discussed. The case could have been handled in a better way had that BDO been examined. Both the prosecutor and the Trial Court ought to have been cautious regarding that aspect. Be that as it may, this circumstance cannot go in favour of the convict appellant as the prosecution has been able to bring home the charge against the accused under Section 409 of the Indian Penal Code.

It was submitted that accused is in custody from 25.04.2013 but I do not know whether he was in custody prior to that. The Trial Court sentenced the convict to suffer RI for four years and to pay fine of Rs.1,000/- in default to suffer further SI for one month. Considering the age of the appellant convict and the sufferings which he has already undergone this Court likes to reduce the substantive sentence from RI for four years to RI for two and half years (2 ½

years) the fine amount be enhanced to Rs.15,000/- in default to suffer further RI for seven and half months.

The finding of guilt by the trial court is hereby affirmed. The substantive sentence is reduced and the fine amount is enhanced in the manner as indicated above.

The appeal is thus answer in part. There will be no order as to costs.

The department is directed to transmit the LCR to the learned Trial Court along with a copy of this order forthwith.

The Trial Court on receipt of the said copy must inform the Correctional Home Authority in which the present appellant is being lodge as to the sentence modified.

(Indrajit Chatterjee, J.)