

(1985) 07 CAL CK 0045

In the Calcutta High Court

Case No : Criminal Revision No"s. 222 and 448 of 1985

Amritlal Chum

APPELLANT

Vs

Devi Ranjan Jha and Another

RESPONDENT

Date of Decision : 26-07-1985

Acts Referred:

Companies Act, 1956 — Section 630, 630(1), 630(2)
Penal Code, 1860 (IPC) — Section 403, 406

Citation : (1987) 61 CompCas 211

Hon'ble Judges : N.G. Chaudhuri, J;G.C. Chatterjee, J

Bench : Division Bench

Advocate : Pradip Kumar Ghosh, Sekhar Kumar Basu and Swapan Kumar Ash, in Criminal Revision No. 222 of 1985 and Balai Ch. Roy, Dilip Kr. Datta, Bhaskar Sen, Ranjan Deb and Surendra Dube, in Criminal Revision No. 448 of 1985, R.N. Bose and J.N. Roy, for the Appellant; Pradip Kumar Ghosh, Sekhar Kumar Basu and Swapan Kumar Ash, in Criminal Revision No. 448 of 1985 and Balai Ch. Roy, Dilip Kr. Datta, Bhaskar Sen, Ranjan Deb and Surendra Dube, in Criminal Revision No. 222 of 1985, for the Respondent

Judgement

This Judgment has been overruled by : Smt. Abhilash Vinodkumar Jain Vs. Cox and Kings (India) Ltd. and others, AIR 1995 SC 1592 : (1995) 84 CompCas 28 : (1995) 2 Crimes 239 : (1995) 3 JT 528 : (1996) 3 LLJ 354 : (1995) 2 SCALE 323 : (1995) 3 SCC 732 : (1995) 2 SCR 873 : (1995) 1 UJ 809

N.G. Chaudhuri, J.—On behalf of Messrs. Jardine Hendersons Ltd., Amrit Lal Chum, one officer of the said company filed on June 28, 1983, a petition of complaint in the court of Sub-Divisional Judicial Magistrate, Alipore, under Sections 406, IPC, and Sections 630 of the Companies Act. The sum and substance of the complaint was that Debi Ranjan Jha, the accused, held various offices under the company during a long career but his service under the company came finally to an end on August 15, 1982. It was alleged that prior to that date, as an officer of the company, he was given possession of a furnished fiat in premises No. 27, Ballygunj Park, Calcutta, of which he was obliged to

deliver up possession to the company on termination of his employment. It was alleged that having wrongfully retained possession of the flat after ceasing to be an officer of the company, Mr. Jha, the accused, committed an offence under Sections 630 of the Companies Act and having dishonestly and wilfully retained articles of furniture with which his flat was furnished, he committed further an offence under Sections 406, IPC. After cognizance was taken, the case was transferred to the court of Mr. P.K. Deb, Judicial Magistrate, Alipore. After examining the witness before charge by an order dated February 1, 1985, the learned Magistrate felt satisfied that there were materials for a charge under Sections 403, IPC, and he framed a charge accordingly. He, however, concluded that the case of complainant in so far as it came under the provisions of Section 630 of the Companies Act, the cognizance of the offence was barred by limitation. In respect of the offence under Sections 406, IPC, the learned Magistrate did not expressly record anything in his order. Both the complainant and the accused felt aggrieved with the order of the learned Magistrate dated February 1, 1985. The complainant company has come up in revision under Sections 401 read with Sections 482, Cr. PC, giving rise to Criminal Revisional Case No. 222 of 1985 wherein, on behalf of the company, grievance is made that on the materials placed before the learned Magistrate, the learned Magistrate should have framed a charge under Sections 630 of the Companies Act, and also under Sections 406 of the IPC. On behalf of the accused, a revision application has been filed giving rise to Criminal Revision Case No. 448 of 1985. On behalf of the accused, it is argued with force that the learned Magistrate was wrong in concluding that materials placed before him were sufficient for framing a charge under Sections 403, IPC, and that the learned Magistrate was wrong in framing a charge under the said Sections 403, IPC.

2. There is no dispute that the employment of the accused, Mr. Jha, as an officer of the company, Jardine Hendersons and Company, and its subsidiaries, was finally terminated on August 15, 1982, as alleged in para 8 of the complaint. There is again no dispute that from a date prior to the said date, as an officer of the aforesaid company, the accused was in possession of a residential flat in premises No. 27, Ballygunj Park, Calcutta, of which the company was a lessee and the said flat was suitably furnished with articles of furniture and many other things for the benefit and enjoy, ment of the accused. There is again no dispute that after the filing of the complaint, in execution of a search warrant, the company has recovered most of the articles from the flat in question which were in the possession and enjoyment of the accused. The accused, however, continues to possess the flat. Mr. Pradip Ghosh, learned advocate, for the company read out before us the order of the learned Magistrate dated February 1, 1985, and points out that relying on the decision in the case of Harkishin Lakhimal Gidwani v. Achyut Kashinath Wagh, [1982] 52 Comp Cas 1 , the learned Magistrate concluded that the provisions of Sections 630 of the Companies Act could be invoked against the accused and he could be prosecuted thereunder, but relying on the decision of this court in the case of T. S. Satyanath

v. /. Thomas [1983] 87 CWN 850 : [1985] 57 Comp Cas 654, he held that cognizance of the said offence was barred by limitation because of the express provisions of Sections 468, Cr. P.C. Mr. Ghosh submits that the finding of the learned Magistrate on the point of limitation is erroneous and misconceived. He does not appear to have considered the provisions of Sections 468, Cr. P.C. as amended in 1978. Mr. Ghosh contends that in the present case, the complaint mentioned an offence under Sections 406, IPC, attracting higher punishment than the offence under Sections 630 of the Companies Act. Mr. Ghosh reads out the interesting judgment of the Bombay High Court earlier referred to in support of his contention. He relies on a further decision of the Bombay High Court in the case of Govind T. Jagtiani v. Sr. Administrative Officer, Indian Oil Corporation [1984] 56 Comp Cas 329 (and contends that the Bombay High Court has taken the view consistently that an officer or employee of a company whose service has been terminated or has come to an end may be prosecuted under Clause (b) of Sections 630 of the Companies Act. For the same purpose, Mr. Ghosh relies on the case reported in [1985] SLR 2083. Mr. Dilip Kumar Dutta, learned advocate appearing on behalf of the accused, Mr. Jha, however, lays emphasis on the opening words of Sub-section (1) of Sections 630 of the Companies Act, namely, "if any officer or employee of a company " and argues that the said opening words qualify as governing clause "the acts of delinquency " mentioned in clauses (a) and (b) of the section. Mr. Dutta contends that the Bombay High Court was in error when in the case cited by the learned Magistrate, it held that for the purpose of Clause (a) of Sections 630(1) of the Act, the accused was required to be an officer or employee of a company, but for the purposes of prosecution under Clause (b), the accused could be a former or past officer or employee of the company. Mr. Dutta argues that a plain reading of the section does not permit making different interpretations of the two clauses in the manner suggested by the Bombay High Court. He contends that the Bombay High Court virtually went to the length of legislating instead of interpreting the law. The argument of Mr. Dutta has considerable weight. Further, Mr. Dutta has referred us to sections 538 and 545 of the Companies Act and he contends that whenever the makers of law in their wisdom thought it proper to bring within the mischief of the provisions of the Act former employees or officers of a company, they did not hesitate to do so and they expressly legislated. He points out that both sections 538 and 545 contemplate prosecution of former employees and officers of a company which is under liquidation. Mr. Dutta argues that if the law-makers desired that Sections 630 would apply equally against the present officers and employees of a company and past or former employees and officers of a company, they would have expressed that desire in proper language. Then, Mr. Dutta argues, if such a desire has not been expressed in Sections 630 of the Act, there is no reason to give a twisted and laboured interpretation to the section which its plain reading does not permit. The arguments of Mr, Dutta are undoubtedly weighty. We have additional reasons also to hold that Sections 630 of the Companies Act applies only to existing officers and employees of a company. No doubt, the opening words of Sub-section (1) serve the purpose of a

key to the interpretation of the section. We have also to bear in mind the words of Clause (b) of Subsection (1) also, which read as follows: " having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by this Act." The " articles and authorised by this Act " are most likely to be known only by the employees of the company. So we feel tempted to confine the application of this Clause to existing officers and employees of the company. Sub-section (2) of Sections 630 indicates that if an offence under the section is established, the court is to order such officer or employee to deliver up or refund within a time to be fixed by the court any such property wrongfully obtained or wrongfully withheld or knowingly misapplied, or in default to suffer imprisonment for a term which may extend to two years. We lay emphasis on the use of the expression "such officer and employee " in Sub-section (2). We mean to say that the order of delivering up or refund can be passed only on an officer or employee of the company. That is possible when the accused in the case is an officer or employee of the company on the date of mandamus. If the accused is not such an officer or employee, obviously such an order of refund cannot be passed on him. If it is possible to pass such an order, no further order need be passed by the court. This means that the rights of the company or persons against the company are to be safeguarded in the proper way and for that no punishment need be imposed on the delinquent, if it is possible to give a direction under the first part of the sub-section. Only when it is not possible to secure compliance with the direction aforesaid, the court is expected to order imprisonment in default of compliance. This attitude of law to the delinquent suggests that the provisions of Sections 630 are to be restricted in their operation against existing officers and employees of the company over whom the company has some hold or authority. Apart from this, we think that if a person while holding an employment under a company obtained possession of some articles in that capacity and subsequently withheld the same or misappropriated the same, for the purpose of prosecuting him, the company or anybody else would avail himself of the provision of Sections 403 or Sections 406 of the IPC. There is no necessity for incorporating special provisions with respect to such persons in the Companies Act itself. The provisions of the Act can be applied to past or former employees if there are sufficient indications in the relevant provisions of the Act as we find in the case of sections 538 and 545 of the Act. Considering all these, we arrive at the conclusion that even though cognizance of the offence under Sections 630 of the Companies Act alleged in the petition of complaint was not barred by limitation, yet a correct and proper interpretation of Sections 630 did not bring a former employee of the company like the accused in the present case within the mischief of the said section. We, therefore, hold, although for different reasons altogether, that the learned Magistrate was right in not framing a charge under Sections 630 in the instant case. The grievance of Mr. Ghosh is unjustified.

3. Mr. Ghosh next contends that on the materials placed before him, the learned Magistrate should have framed a charge under Sections 406, IPC against the

accused. The essence of an offence under Sections 406 is entrustment. In the petition of complaint there is no whisper that any article of furniture, movable or immovable, was entrusted to the care and custody of the accused. Taking a liberal view of the complaint, we examined the evidence adduced but found nothing therein to indicate that anything was entrusted to the accused. We have read the deposition of P.W. 1, P.W. 2, P.W. 3 and P.W. 4 examined by the learned Magistrate. The witnesses do not say that the accused was entrusted with any articles of furniture or with any other movable, or even with the flat itself. The sum and substance of the deposition is that as a condition of service, the accused was given possession of a flat furnished with articles and the implication is that with the termination of his employment, he was to deliver up vacant possession of the flat together with the fixtures and furniture with which the flat was furnished. If the accused has not delivered up possession of the flat with fixtures and furniture to the company on the termination of his employment, he has only committed a breach of contract. The company is well entitled to file a suit in a civil court for appropriate reliefs. Proceedings in a criminal court cannot be resorted to to reach that end. It is to be noted that the company did not prosecute the accused under Sections 448, IPC. We may, in this connection, refer to the decisions of the Supreme Court in the case of Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, and the case of Ramaswamy Nadar Vs. The State of Madras, . We are satisfied from a reading of these two decisions of the Supreme Court and other decisions that the essence of an offence under Sections 406 is entrustment. In the present case, neither entrustment was alleged or proved nor any fiduciary relationship between the accused and the company was alleged to have been proved. We are, therefore, satisfied that the learned Magistrate was perfectly justified in not framing a charge under Sections 406, IPC. We cannot uphold the contentions of Mr. Ghosh in this behalf.

4. We have indicated that the accused has his grievance against framing of a charge under Sections 403, IPC. The learned Magistrate has, as a matter of fact, framed a charge against the accused under the said section. Reading the charge as framed, we notice a patent or obvious defect therein. In the charge, the property in respect of which the alleged misappropriation was made has not been expressly mentioned. This is a serious lacuna in the charge itself. Further, Sections 403, IPC, required that there must be a dishonest misappropriation or conversion to one's own use some movable property. In the present case, there is no allegation of misappropriation or conversion by the accused of any property. We have noticed that the substance of the petition of complaint is that the accused did not give up possession of the flat with furniture and fixtures immediately on the termination of his employment under the company. Accepting that the accused is still in possession of the flat with fixtures and furniture, his possession of the flat with fixtures and furniture does not amount to misappropriation or conversion of the articles of furniture and fixtures to his own use. In so far as the flat itself is concerned, that being an immovable property, that cannot be a subject-matter of an offence under Sections 403, IPC, which is

restricted to movables only. The learned Magistrate has observed in his order that dishonest misappropriation for a time only is misappropriation within the meaning of section. The learned Magistrate meant to say that even if the accused possessed fixtures and furniture given to him for his enjoyment in the fiat for a temporary period subsequent to the termination of his employment under the company, such use and enjoyment by the accused amounted to misappropriation. We regret we cannot share this view. The illustration under Explanation 1 to Sections 403 indicates beyond doubt that Explanation I applies only to money in cash or valuable securities and not to ordinary articles of fixtures or furniture. We, are, therefore, of the view that on a close scrutiny of the evidence adduced, we should arrive at the conclusion that there were no materials for framing a charge under Sections 403 even against the accused. The learned Magistrate, in our view should have discharged the accused. In the result, after hearing the learned advocates and taking the view as indicated above, we conclude that Revision Case No. 222 of 1985 which is being treated as a contested application is liable to be dismissed on contest and is, as a matter of fact, so dismissed. With regard to the other revision application, namely, Criminal Revision No. 448 of 1985, we are satisfied that the said application should be allowed and the rule issued should be made absolute. The order impugned in so far as it framed a charge under Sections 403 against the accused in case No. C/1054/83, TR/188/83 before Shri P. K. Deb, the learned Judicial Magistrate, Third Court, Alipore, be set aside. The accused is discharged.

Gobinda Chandra Chatterjee, J.

5. I agree.