
(1967) 10 BOM CK 0022

In the Bombay High Court

Case No : Criminal Revision Application No. 152 of 1967

Deochand Durlabhji Jogi

APPELLANT

Vs

Madanlal Gopikisan Sharma

RESPONDENT

Date of Decision : 04-10-1967

Acts Referred:

Penal Code, 1860 (IPC) — Section 405, 406

Citation : (1968) 70 BOMLR 280 : (1968) MhLj 113

Hon'ble Judges : Deshmukh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Deshmukh, J.—This is a revision application by the accused against the framing of the charge u/s 406 of the Indian Penal Code by the Judicial Magistrate, First Class, Akola.

2. The facts of this case are not being disputed for the purpose of this revision application. The complainant Madanlal was a servant in the shop of the accused Seth Deochaud. According to the complainant, his services were abruptly terminated by the accused on or about October 19, 1965. The accused called the complainant twice or thrice for the purpose of receiving his salary after making his accounts. The complainant claimed, in addition to salaries, two amounts of deposits kept by him, with the accused. The first item was of Rs. 2,000 deposited on July 30, 1965. The second item was of Us. 850 deposited on September 11, 1965. The terms of the deposit alleged in the written complaint, as well as the oral evidence, are that the deposit was not to carry any specific interest, but the accused agreed to give the same interest which he was paying to other depositors. The complainant alleges in an uncertain manner that the interest was to be anything from eight annas to ten annas per cent.

3. When this deposit amount was claimed by the complainant, the accused came out with a flat refusal that there was no deposit in the shop. Having received that

reply, the complainant lodged a complaint to the police against the accused, but they refused to take any cognizance of the same. They, no doubt, seized some of the documents in which credit entries relating to the deposit amounts were alleged to exist in the name of the complainant. The complainant ultimately filed a private complaint which was entertained by the Magistrate. He recorded the evidence and framed a charge u/s 406 of the Indian Penal Code. Being aggrieved by this framing of the charge, the complainant has filed this revision application.

4. Mr. Manohar, learned counsel appearing for the accused-petitioner, argues that, at this stage, all that the complainant says may be accepted as prima facie true. The only question that is being raised is that even after accepting all that the complainant said as true, does it disclose a criminal offence and would all that the complainant says end in conviction, if unrebutted? According to Mr. Manohar, the ingredients of Section 405 of the Indian Penal Code are not present at all in this case even if the entire testimony of the complainant is to be accepted without any challenge. The only question that falls for consideration in this revision application, therefore, is whether, on the evidence that is placed on record of the Judicial Magistrate's Court, a charge u/s 406 of the Indian Penal Code should be framed or not.

5. Mr. Manohar argues that the provisions of Section 406 of the Indian Penal Code are not attracted at all to the facts and circumstances of this case. This is a case of deposit of amount and there is no entrustment at all within the meaning of that expression, as used in Section 405 of the Indian Penal Code. Unless there is an entrustment, there cannot be an offence of criminal breach of trust. It may be that the entrustment could be in any manner as contemplated by that section. Even taking the widest amplitude of that expression into account, a mere deposit of money by a depositor does not create an entrustment as conceived of by that section. When the complainant speaks of a deposit with the accused, obviously he means that the accused acted as a banker and the complainant deposited the amount with the accused in his capacity as a banker. In a normal deposit in current account of a bank, the contract is that the amount will be repaid as and when demanded by the depositor. However, there is no corresponding contract or obligation upon the bank to retain the amount paid by the depositor as a separate fund by way of trust. It is an incident of the normal banking operation that the bank will mix the amount deposited by a depositor with the general fund of the bank and will have all the rights to invest that money into ventures which the appropriate officers of the bank think, would be profitable for the bank. When the depositors claim from the bank and the bank either refuses to pay or is unable to pay, it is difficult to imagine that a criminal breach of trust has been committed by the bank. Not honouring the obligation to return the amount would expose the bank to a civil liability but not to a criminal charge of breach of trust.

6. Mr. Manohar has relied on some cases of the various High Courts. He argued before me that in spite of his best effort, he could not find a reported judgment of this Court. So far as the deposit of a present type is concerned, where the

employee keeps money with the employer not by way of security deposit for service or during the course of service, but a normal type of deposit which the customers often keep with the shopkeepers, what kind of relationship is created and what are the exact terms of contract, express or implied, in such a deposit must be found out. The commentary in the latest edition of Ratanlal and Dhirajlal's Law of Crimes could hardly render any assistance in that behalf. I could get some assistance from the Seventh Edition (1962) on the Penal Law of India by Dr. Sir Hari Singh Gour. The gist of the commentary on the proposition of deposit is that where a relation of debtor and creditor alone is created by bailment of money, a civil liability is created.

7. Criminal liability arises in addition to the civil liability where the beneficial ownership of the property is not transferred to the accused and he is placed under an obligation, contractual or otherwise, to utilise the money for the specific purpose for which it was handed over to him. So far as the present contract is concerned, I was taken through the complaint as well as the oral testimony of the complainant. He has not alleged anywhere that it was a term of the contract that the deposit amount was to be used in a particular manner or towards a particular purpose. He merely says that money was deposited. He then adds that he demanded back that deposit on a certain day and the accused refused that there was any such deposit. There is, therefore, nothing in the contract alleged by the present complainant to hold that any additional obligation or contract was a part of the original transaction of deposit.

8. Mr. Manohar relied upon certain observations in Chelloor Mankkal Narayan Ittiravi Nambudiri Vs. State of Travancore-Cochin, . The facts of that case are entirely different and do not approach anywhere near the facts of the case under consideration. The receiver of a Mill sold cloth in the days of control to the complainant at a price which was much higher than the control price specified by the Textile Controller. When the receiver came to be prosecuted u/s 405 of the Indian Penal Code, the defence taken up by him was that the excess amount was received by him by way of illegal gratification or by way of remuneration for entertaining the claim of the complainant for supplying cloth to him. That was, therefore, a consideration for the favour shown and there was no question of entrustment of money at all. When there is no entrustment, there can be no question of misappropriation. The facts of that case are entirely different from the facts before me. However, an observation in para. 21 is being relied upon to point out that the first thing that must be proved in a charge u/s 405 of the Indian Penal Code is to prove the entrustment. The Supreme Court observes that (p. 484) :

...As laid down in section 385, Cochin Penal Code, (corresponding to Section 405, Indian Penal Code) to constitute an offence of Criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it.

The entrustment, therefore, is the primary fact to be proved before a person

could be hauled up to answer a charge u/s 405 of the Indian Penal Code. This is a limited purpose for which that case was cited and I think, on plain reading of Section 405, it is obvious that the first ingredient of the offence that must be proved by the prosecution is to prove that there has been an entrustment with property and it could be in any manner. It may, therefore, be that looking to the opening clause of Section 405, the entrustment could be in any manner and no restriction is placed upon the broadest implications of entrustment. The choice of the words by the Legislature may indicate that a broader concept of trust is being assumed for the purpose and not a limited concept of trust under the Indian Trusts Act.

8. The second case on which reliance is placed is a judgment of the Calcutta High Court in *S. Pakrashi and Another Vs. Emperor*, . That was a case of a deposit by a customer in a bank, called the Ruby Bank Limited. It was a deposit in a current account. The complainant issued certain cheques from time to time which were honoured but his last cheque for Rs. 197-14-6, dated May 8, 1940, was not honoured. It was returned with an endorsement which referred to reason No. 18. That reason read "please receive payment on Friday, 17-5-1940," The cheque was presented twice or thrice but payment was not made. Prosecution u/s 405 of the Indian Penal Code was launched on May 13, 1940. That judgment of the Calcutta High Court quotes in extenso passages from Halsbury's Laws of England, Second edn., at p. 796, para. 1305, and also observations of Lord Cottenham, then Lord Chancellor, in his speech in the House of Lords in *Foley v. Hill* (1848) 2 H.L.C. 28 . The observations of the Lord Chancellor, which are pertinent to the point show that money when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit out of it he can, which profit he retains to himself, paying back only the principal according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. Since the Calcutta High Court was dealing with a case of a banker, the observations from Halsbury as well as from the House of Lords' case being appropriate were quoted in extenso. Yet another case on which reliance is placed by Mr. Manohar is *Mubarak Hossain and Another Vs. The King*, . That was also a case of a deposit in bank by the complainant, who held a current account. The complainant's case in brief was that the managing agents of the bank used the money which he deposited in his current account for the purpose of other businesses and thereby they committed the offences charged against them. That was a peculiar case where the investment by the bank in the business of its own was itself styled as misappropriation of money. A similar observation as in the earlier judgment is found in para. 4 of the report. That was a case where the charge was yet to be framed and even evidence was yet to be led. On the

application of the accused, the High Court held that the relationship between a depositor and a bank is the simple relationship of a creditor and a debtor. A depositor who deposits money in a bank in his current account is nothing more than a creditor and it cannot be said that there has been any entrustment to the bank for any particular purpose. The bank, of course, is liable to refund the money to the depositor when the depositor calls for it, but the money deposited belongs to the bank and the bank is entitled to deal with it as it likes.

9. Mr. Manohar also relied upon a judgment of the Allahabad High Court which comes very near the facts of the present case. In *State Vs. Tirath Das*, the Court was concerned with a certain amount paid by the complainant to one of the partners of a firm in Bombay for the purpose of depositing that money into the firm account in the first instance and then utilise it for the purpose of purchasing certain goods for the complainant. The entry, however, showed that the money was entrusted by the complainant to one Tirath Das, a partner of the Bombay Firm of Jhangiram Hukumchand Bombaywala, but no purpose was mentioned in that entry. That was the entry made in the complainant's own accounts. When the goods were purchased and the Bombay firm and Tirath Das were asked to make payment out of the deposit amount, they did not make payment, and the complainant had to make payment himself. He then claimed back the deposit amount and the reply sent by the Bombay firm was to request the complainant to wait for ten days. Even during those ten days, money did not arrive and hence the complaint u/s 409 of the Indian Penal Code. After quoting Section 405, the judgment proceeds to point out that the one underlying idea in Section 405 is undoubtedly this that the property which is the subject-matter of entrustment, or in respect of which dominion is passed over to the accused, does not even for the time being, become the property of the accused which he could use for his own purposes. The creation of the trust or the passing of dominion over certain property implies that the person to whom property is handed over does not become the beneficial owner thereof even for the time being. It further implies that there is a responsibility to return the article which has been deposited by the complainant. In the absence of any such contract in specie, the non-return of the deposit by the Bombay firm did not constitute any offence u/s 405 of the Indian Penal Code.

10. A discussion of the available case law as well as the main ingredients of Section 405 of the Indian Penal Code would show that there has got to be an entrustment or dominion over the property in the first instance. It must be in respect of the property. The word "property" in Section 405 of the Indian Penal Code has been understood as movable property. Then there must be a misappropriation or conversion by the accused to his own use of that property, or he must have dishonestly used or disposed 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 to do so. When these ingredients are established, then only the offence could be held proved. Mr.

Manohar particularly lays emphasis on the fact that in a case of breach of trust u/s 405 of the Indian Penal Code, there must necessarily be an obligation to return the property entrusted in specie. In the matter of deposit of money, the same currency notes are not to be returned but an equivalent amount is to be returned. So far as the depositor's money is concerned, this may be correct, but I do not think that a restricted approach of requiring the articles to be returned in specie could be laid down as an indispensable part of Section 405 of the Indian Penal Code. If for instance, money is handed over for a specific purpose or with specific directions and those directions of law or contract are not obeyed, there can be a case of misappropriation. If fact, such a contract could be made even with a bank. If a banker agrees to keep a certain amount, deposited with him, as a separate fund to be utilised for a specific purpose, then mixing that amount in the general revenue of the bank and not utilising that amount for the specific purpose would constitute a violation of the terms of the contract under which the entrustment took place. However, the broad proposition of the requirement of entrustment is basic to the creation of any situation where an offence u/s 405 of the Indian Penal Code is being alleged.

11. Mr. Chandurkar, appearing for the State, relied upon certain observations of a Division Bench judgment of this Court in *Kanhayalal Supdubhai Vs. Hiralal Deoram*, . That was a civil suit for an account of certain deposits, and the question that arose for consideration was about limitation. If the transaction of monies kept with the defendant in that case could be styled as a mere loan transaction, then the period of limitation would be different. However, if it could be held that the transaction was one of deposit, then the article that would be applicable would be quite different. The Court was then called upon to consider the ingredient of deposit and pointed out that there is an initial difference between a deposit and a loan, A deposit, as distinct from a loan, means a passing of money not for the convenience of the man to whom it is given but for the benefit of the person who hands it over. In a transaction of loan, a person to whom money is paid is a needy person for whose need money is paid. In a case of deposit, the person to whom money is paid, is not in need of money, but the person who pays money is in need and, therefore, finds out a person with whom the money could be deposited. To the extent of that transaction, the person with whom money is deposited becomes a banker. That approach, to my mind, is entirely different where a sort of trust is conceived of, for the purpose of applying a different article of the Limitation Act. I do not think that the case on which Mr. Chandurkar relies can be of any particular assistance in deciding the question that is raised before us.

12. I am, therefore, inclined to infer that in order that a charge could be framed against the accused petitioner, it was primarily necessary to establish that there was an entrustment of property. Even if the complainant is taken at his words, it only means that he deposited the money on condition that it will be returned to him together with interest, as was customarily paid to others as and when the deposit amount is asked back by the complainant. It is not the term of the

contract at all that the amount deposited by the complainant was to be kept as a separate fund or was to be specifically applied to a particular purpose. The accused acted as a banker so far as the deposit is concerned. As soon as the complainant deposited the money with the accused except with the obligation of returning that amount when demanded as per terms of the contract, the beneficial ownership in that money passed on to the accused who was entitled to make use of it for his own purpose. He could mix it with the general fund of his shop and could utilise that money as his normal revenue for the purpose of his business. It was not necessary for the accused to return the same money. He was only obliged to return an equal amount as and when demanded. The relationship that is created is only that of a creditor and debtor. If the debtor denies the debt and even if that denial is dishonest, it is difficult to infer that a criminal liability is incurred which could constitute an offence u/s 405 of the Indian Penal Code. In this view of the matter, so far as the facts of this case are concerned even accepting the complainant at his word, no case is made out that a charge u/s 406 of the Indian Penal Code requires to be framed. The learned Magistrate was, therefore, in error, in framing a charge even if the case of the complainant was not to be rebutted.

13. I would, therefore, accept this revision application, make the rule absolute and quash the charge that is framed against the accused. As no case for framing the charge is made out in the eyes of law, the accused shall stand discharged.