
(1993) 02 GUJ CK 0012
In the Gujarat High Court

Indravadan @ Indubhai Chimanlal Shah

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 12-02-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Penal Code, 1860 (IPC) — Section 120B, 406, 406, 420

Citation : (1993) 2 GLR 1351

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Judgement

J.N. Bhatt, J.—By this revision, the petitioner, who is the original accused No. 2, has assailed the legality and validity of the order of conviction u/s 406 of the Indian Penal Code and sentence to suffer rigorous imprisonment for six months and to pay fine of Rs. 1000 and, in default, to suffer rigorous imprisonment for three months, passed by the learned Chief Judicial Magistrate, Bharuch, on 19-10-1981, in Criminal Case No. 1875 of 1980, which was confirmed in Criminal Appeal No. 94 of 1981, by the learned Sessions Judge, Bharuch, on 18-11-1983, except reduction of sentence of rigorous imprisonment of six months to one month, by invoking the provisions of Section 397 read with Section 401 of the Criminal Procedure Code, 1973 ("Code" for short, hereinafter).

2. A resume of the material facts giving rise to the present appeal, may, shortly be stated, at this stage.

3. One M/s. Parekh & Parekh Engineering Company" had taken contract of construction of "E" type quarters and trainees" hostel premises in the Township of Narmada Valley Fertilizer Corporation ("Corporation" for short, hereinafter), at Bharuch. According to the prosecution case, for the purpose of the said construction, the Corporation was required to supply building material, including cement, to the contractor. The required cement was to be got issued From the store of the Corporation as and when required and the same was to be taken into at the site of the township itself for the purpose of construction of the aforesaid

quarters. Thus, it is contended by the prosecution that the cement so supplied was to be used by the contractor or his persons or agents solely for the purpose for which the cement was handed over. The petitioner herein is the original accused No. 2, who is hereinafter referred to as the "accused No. 2" for the sake of convenience.

4. Accused No. 2 was working as a Supervisor and he was also managing the affairs of the construction work at the township on behalf of the contractor's firm. On 5-2-1980, two truck loads of cement bags, each containing 200 bags, were handed over to the accused No. 2 for the purpose of the aforesaid construction work. It is the prosecution case that out of the said two truck loads, one truck load containing 200 bags of cement, were reported to have been sold to a private individual, from Surat, namely, Dilipbhai Babubhai Kapadia, who was the original accused No. 1 in the trial Court. On receipt of the said information, the Security Officer of the Corporation, alongwith other personnel of the security department, had kept a watch at Zadeshwar Bridge, over river Narmada. 200 cement bags came to be loaded in Motor Truck No. GTG 1061, on 5-2-1980 and accused No. 2 was sitting in the said truck at the relevant time. The cement bags in question were loaded from the store of the Corporation situated near Bholav Rest House, on the road, leading to old Road Bridge over Narmada and after loading the same, the said quantity of cement had to be taken at the site in the township from the store. Instead, the said truck in which accused No. 2 was accompanying was taken towards the direction of the township, but instead of entering into the gate of the township, it took turn to the National Highway and went towards Surat side. The truck came to be stopped near Zadeshwar Narmada Bridge, on the National Highway, which is at a distance of 4 to 5 kms. and it was checked. The driver of the truck, Dhanji Karsan, RW. 6, clearly informed that the truck was being taken to Surat as the cement loaded therein was of accused No. 1, Dilipbhai Babubhai Kapadia, who was sitting in the front scat by the side of the driver of the truck. It may be noted that accused No. 2, Mr. Shah, had got down, who had accompanied the said truck in the beginning. He got down from the truck near the junction of four roads leading to National Highway from where accused No. 1 sat in. Upon inquiry, it was transpired that accused No. 1 had purchased the said cement bags loaded in the truck from the store of the Corporation on payment of the price to accused No. 2 and the same was to be carried in the said truck, to Surat. Consequently, the Security Officer took the truck to the premises of the Corporation and a complaint was lodged at the Police Station.

5. Investigation was carried out and on completion of the investigation both the accused persons came to be charge-sheeted for the offence punishable under Sections 420, 406 and 120-B of the Indian Penal Code and also for the offence punishable under Sections 7 and 8 of the Essential Commodities Act, 1956 ("the Act" for short) read with Clauses 3, 10, 22 and 24 of the Cement Control Order.

6. On appreciation of the evidence and the analysis of the facts and

circumstances emerging from the record, the learned Chief Judicial Magistrate found both the accused persons guilty for the offence punishable u/s 406 of the Indian Penal Code. In so far as accused No. 2 is concerned, he was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1000 and in default to suffer further rigorous imprisonment for three months. So far as accused No. 1 is concerned, he came to be convicted for the offence u/s 406 of the Indian Penal Code read with Section 114 of the Indian Penal Code. However, considering the facts, the trial Court accorded benefit of probation to accused No. 1. The trial Court directed that the Muddamal Article, that is, Rs. 6500 shall be confiscated to the Government.

7. Being dissatisfied by the said order of conviction and sentence, accused No. 2, Mr. Shah, had preferred Criminal Appeal No. 94 of 1981 before the learned Sessions Judge, Bharuch, Upon hearing and on examination of the facts and circumstances, the learned Sessions Judge confirmed the conviction of accused No. 2 u/s 406 of the Indian Penal Code. However, the order of substantive sentence of rigorous imprisonment for six months came to be reduced to one month. The sentence in default of the payment of fine was also confirmed. Being aggrieved by the said judgment and order of the learned Sessions Judge, the original accused No. 2 has, now come up before This Court by way of this revision, challenging its legality and validity.

8. The Learned Counsel for the petitioner/original accused No. 2, Mr. Shethna, has, seriously, contended that the impugned orders of conviction and sentence of the Courts below are, totally, perverse and illegal for the offence u/s 406 of the Indian Penal Code. In that he has submitted that the prosecution has failed to prove the important element of entrustment, which would attract the rigours to the punishment prescribed u/s 406 of the Indian Penal Code for criminal breach of trust. This submission is, seriously, countenanced by the learned A.P.P. for the respondent-State.

9. Before the aforesaid contention is examined in greater details, it may be mentioned at this stage, that the revisional jurisdictional sweep of this Court is very much circumscribed. This proposition is very well settled. The concurrent finding of facts cannot be interfered with lightly unless and until misreading of evidence, perversity, illegality or unreasonableness resulting into miscarriage of justice is, successfully pointed out or spelt out from the record. Bearing in mind these limitations, the merits of the revision are required to be examined.

10. The contention raised by Learned Counsel Mr. Shethna for the petitioner is that there was as such no entrustment in respect of the Hoods in question, that is, cement bags and, therefore, there would be no commission of offence punishable under Sections 406 of the Indian Penal Code and according to him it goes to the root of the matter and it is a question which can be considered in this revision. Without entering into further details whether it amounts to a question of law or not since This Court is addressed at marathon length, it is thought expedient to consider the merits of this submission.

11. The punishment for criminal breach of trust is prescribed in Section 406 of the Indian Penal Code. The expression "Criminal breach of trust" is defined in Section 405. It would be, therefore, interesting to refer to the provisions of Section 405 of the Indian Penal Code, which read as under:

405. wherever, being in any manner entrusted with property, or with any domination 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."

Explanation I: A person, being an employer of an establishment whether exempted u/s 17 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952) or not, who deducts the employees' 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 for 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 employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by Employees' State Insurance Corporation established under the employees' State Insurance Act, 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.

12. When Section 405 which defines "Criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only tile custody of the property to be kept or disposed of by him for the benefit of the other party, or to deal with it as per the directions. No doubt, it is amply clear from the aforesaid provisions that 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. It has to be established further that in respect of the

property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract by the accused himself or by someone else which he willingly suffered to do. It, therefore, becomes that it follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. This proposition of law is very well settled. In the light of the facts and circumstances emerging from the record of the present case, it cannot be contended even for a moment that there was no entrustment of cement bags in question to the accused persons.

13. 200 cement bags in question were handed over by the Storekeeper, Hankrishna Trikamlal, P.W. 2, who is examined, at Ex. 30, to accused No. 2, by virtue of Material Issue Voucher produced, at Ex. 31. dated 5-2-1980. So, on 5-2-1980. accused No. 2, being the Supervisor of the contractor, M/S. Parekh & Parekh Engineering Company, signed the Material Issue Voucher and requested for delivery of 200 bags of cement and the Store-keeper, P.W. 2, Hankrishna Trikamlal, who is examined, at Ex. 30, handed over 200 bags of cement to accused No. 2 which came to be loaded in the truck No. GTG 1061, alongwith Gate Pass, which is produced, at Ex. 35, on the same day, i.e., 5-2-1980. The said loaded truck, wherein, the accused No. 2 was silting did not go to the site in the township premises but went out and, as rightly observed by the Courts below concurrently, the said cement bags in question were disposed of dishonestly or misappropriated by the accused No. 2. This version of the prosecution is, succinctly, established without any shadow of doubt, even from the evidence of driver of the truck, Dhaujibhai Karsanbhai, P.W. 6, who is examined, at Ex. 40. It is clear From the evidence on record that 200 bags of cement which were required to be utilised for the purpose of construction of the Corporation for which accused No. 2 way handed over possession of the cement were misappropriated and accused persons dishonestly disposed them of in violation of the terms and conditions of the tender form.

14. Learned Counsel for the petitioner/accused No. 2 has also, seriously, contended that even if the entrustment is proved then also the prosecution has not, successfully, proved that there was dishonest misappropriation or dishonest disposal of the cement bags. Thus, it is contended that the element of dishonesty is required to be proved and the prosecution has failed to prove the same and, therefore, the conviction should be quashed.

15. u/s 24 of the Indian Penal Code, the expression dishonestly is denied. It provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly". In Section 23 of the Indian Penal Code defines "wrongful gain"/"wrongful loss". Therefore, it will be necessary to refer to the said provisions of Section 23 of the Indian Penal Code which read as under:

23. "Wrongful gain" is the gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully/Losing wrongfully:

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to loss wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

As could be seen from the aforesaid provisions, wrongful gain includes wrongful retention and wrongful loss is when a person is wrongfully kept out of any property as well as wrongful deprivation of the property. Therefore, when a particular thing has gone into the hands of servant he will be guilty of misappropriating the thing in all circumstances which show a malicious intent to deprive the master of it. Here, in the present case, accused No. 2, Mr. Shah, took the delivery of the cement bags and dishonestly misappropriated and disposed of by selling it to accused No. 1, who had come alongwith the truck right from Surat to Bharuch for taking delivery of the cement bags in question. Thus, there is clear and convincing evidence on record to show that instead of using cement bags for the purpose of construction work of the Corporation, accused No. 2 misappropriated and disposed of dishonestly to accused No. 1. Thus, there was wrongful loss to the Corporation and wrongful gain to the accused persons. It may be mentioned that there may not be direct evidence to prove dishonest intention or dishonest disposal. It has to be inferred from the set of proved facts on record. In the present case, 200 bags of cement belonged to the Corporation were handed over to accused No. 2, for the purpose of construction of the quarters pursuant to the tender contract given to M/s. Parekh & Parekh Engineering Company. The ownership in respect of the cement hags remained with the Corporation. Accused No. 2 was entrusted with the said property for the purpose of construction of the quarters of the Corporation. However, the said quantity of cement bags which was a controlled item, was diverted by accused No. 2 and dishonestly misappropriated and also obtained wrongful gain by selling it to accused No. 1 which was allotted to the Corporation by the Government for the very purpose of construction of the quarters. It has been, succinctly, established that in respect of the property so entrusted to the accused No. 2, there was dishonest misappropriation and dishonest disposal and accused No. 2 received wrongful gain which was in clear violation of the legal contract between the contractor arid the Corporation. The contract (tender form) is produced in the present case, at Ex. 60. It is dated 26-3-1979. General conditions of the contract are clearly incorporated in the said tender. Steel and cement had to be supplied by the owner, that is, the Corporation, to the contractor. The following two conditions mentioned in respect of cement for the purpose of construction of the said quarters are very important, which are not disputed:

(i) All the steel and cement issued by the owner shall be accounted for. Wastage will be allowed at 3% and 5% of admissible weight of steel incorporated in the works for M.S. reinforcement work and structural steel work respectively. Wastage for cement will be allowed at 5% where weight-batching is adopted and 3% where volumes batching is adopted.

(ii) The surplus quantity of materials remaining unused after the works are finally completed, -IF IN ORIGINAL CONDITION" and having minimum acceptable sizes as specified below shall be returned to owner's stores as directed by Engineer-in-Charge. Credit for such materials shall be given at the rates at which these materials were issued to the Contractor:

(a) Structural steel sections -Minimum acceptable length 2 Metres. (b) M.S. reinforcement -"do" (c) M.S. Plate/chequered plate - Minimum area of acceptable piece 0.5 sq.mt. but shall have minimum width of 250 mm.

Considering the terms and conditions of the contract for the purpose of construction of the quarters given to the contractor by the Corporation and consistent evidence of the witnesses, it is very clear that the accused persons are guilty for the offence punishable u/s 406 of the Indian Penal Code, beyond reasonable doubt. The views of the trial Court and the appellate Court and the ultimate conclusions recorded, except the question of quantum of sentence, are, fully, justified.

16. Learned Counsel for the petitioner/accused No. 2, Mr. Shethna, has also placed strong reliance on the decision of the Supreme Court in the case of The State of Gujarat Vs. Jaswantlal Nathalal, . Having dispassionately examined, This Court is of the opinion that the said decision is inapplicable to the facts of the present case. The following para is relied on from the said decision, which reads as under:

The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. Thus where the Government sells cement to its contractor solely for the purpose of being used in connection with the construction work the circumstance does not make the transaction anything other than sale. After delivery of the cement the Government has neither any right nor dominion over it. If the purchaser or his representative fails to comply with the requirements of any law relating to cement control he should be prosecuted for the same. But it cannot be held that there was any breach of trust.

The aforesaid observations relied on from the said decision are also not helpful to the petitioner/accused No. 2. It is also clearly held in the said decision that the term "entrusted" found in Section 405 of the Indian Penal Code governs not only the words "with the property" immediately following it but also the words "or

with any dominion over the property" occurring thereafter. Before there can be any entrustment, there must be a trust meaning thereby, an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust. It is further held in the said decision that the expression "entrustment" carries with it the implication that the person handing over any property or in whose behalf that property is handed over to another, continues to be its owner. Further, the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the Government had sold the cement in question to B.S.S. solely for the purpose of being used in connection with the construction work referred to in the judgment. The case of the prosecution in that decision was that after taking delivery of the 100 bags of the cement, the respondent delivered at the work site 60 bags of cement and the remaining 40 bags, he sent to the godown of P.W. 2 - Tayabali Jiwaji. It may be mentioned that it is very clear from the aforesaid decision that in that case the written agreement between the Government and B.S.S. had not been produced. Not only that, in that case there was neither any oral evidence on record nor the agreement between the Government and B.S.S. Therefore, it was held on the basis that the contract given to the B.S.S. was one of those usual contracts under which it was for the contractor to secure the necessary materials. Evidently because cement was a controlled commodity in 1963, B.S.S. had to apply for its allotment. In the absence of any evidence to the contrary, it was held that B.S.S. either paid for the cement in question or its price was adjusted towards the money due to it.

17. In the present case, it is amply clear from the terms and conditions/of the contract that the allotment of cement was made by the Government to the Corporation so that the Corporation could supply the cement to the contractor for the purpose of construction of the quarters in question. There was no transaction of sale as such. In case of a complete transaction of sale, there may not arise the question of entrustment and resultant breach of confidence or trust. In the aforesaid decision of the Supreme Court, there was a complete sale transaction, whereas, in the present case, the cement bags were given by the Corporation to the contractor pursuant to the terms and conditions of the contract, whereby, the ownership of the items remained with the Corporation-the owner and it is also very clear from the terms and conditions that even the surplus material, if any, are required to be returned to the Corporation by the contractor. Thus, there was as such no transaction of sale as contended on behalf of the accused No. 2 before This Court, with the help of the aforesaid decision. In the present case, there is a written contract. There are clear directions that the cement bags taken by the contractor from the store of the Corporation were to be used solely for the purpose of construction of the quarters for which the contract was entered into.

Against the aforesaid specific direction in the terms and conditions of the contract, accused No. 2 who was handed over 200 bags of cement, dishonestly diverted and misappropriated and, thereby, caused wrongful loss to the Corporation and he obtained wrongful gain. Therefore the aforesaid decision of the Supreme Court will not be of any help to the petitioner/accused No. 2.

18. In view of the aforesaid facts and circumstances narrated hereinbefore and considering the entire conspectus of the testimonial collections, This Court has no hesitation in holding that the prosecution has established beyond any shadow of doubt the guilt of the accused persons for the offence punishable u/s 406 of the Indian Penal Code. The views adopted and the ultimate conclusion reached by the Courts below are, fully, justified.

19. Lastly, it leaves into the field the question of quantum of sentence. Learned Counsel for the petitioner, Mr. Shethna, has contended that considering the nature of evidence and the intervening time lag and the special circumstances emerging from the record of the present case, the order of substantive sentence of rigorous imprisonment for one month awarded by the Sessions Court, is excessive and harsh and the sentence of fine should be considered as sufficient in the present case.

20. Having regard to the peculiar facts and circumstances and the nature of/the offence and the fact that the incriminating transaction and the resultant offence occurred more than 12 years before and considering the modern trends and waives prevalent in the realm of criminology and penology, ends of justice will be satisfied if the order of substantive sentence of rigorous imprisonment for six months as awarded by the trial Court which has been reduced to one month by the Sessions Court is quashed and while doing so the sentence of fine of Rs. 1,000/- is enhanced to Rs. 6,000/-.

21. In view of the aforesaid facts and circumstances, the conviction of/the petitioner/original accused No. 2 for the offence punishable u/s 406 of the Indian Penal Code is confirmed. However, the order of substantive sentence is set aside and the sentence of fine of Rs. 1000/- is enhanced to Rs. 6,000/-. Thus, ends of justice will be satisfied if the accused No. 2 is directed to pay an additional amount of fine of Rs. 5,000/- and, in default, to undergo rigorous imprisonment for six months.

22. In the result, the impugned order of conviction is confirmed. The impugned order of substantive sentence is quashed and the sentence of fine of Rs. 1,000 is enhanced to Rs. 6,000 and, in default, to undergo rigorous imprisonment for six months.

23. At this stage, Learned Counsel for the petitioner/original accused No. 2 has requested that the petitioner accused No. 2 may be given 8 weeks" time to make payment of fine. Time is granted, as requested.

24. Rule made absolute to the aforesaid extent.