

**(2005) 12 AHC CK 0047**

**In the Allahabad High Court**

**Case No :** Criminal Miscellaneous Writ Petition No. 11675 of 2005

Pradeep Agrawal alias Sappu

APPELLANT

Vs

State of U.P. and Vishan Chandra Agrawal

RESPONDENT

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**Date of Decision :** 21-12-2005

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Criminal Procedure Code, 1973 (CrPC) — Section 155(2)  
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17  
Penal Code, 1860 (IPC) — Section 405, 406  
Ranbir Penal Code, 1989 — Section 409

**Citation :** (2005) 12 AHC CK 0047

**Hon'ble Judges :** Shiv Shanker, J; Amitava Lala, J

**Bench :** Division Bench

**Advocate :** P.S. Dubey, for the Appellant; Umesh Chandra Mishra and A.G.A., for the Respondent

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## **Judgement**

Amitava Lala, J.—According to the story of the informant in the first information report, the petitioner did not refund the amount of Rs. 50,000/- taken for his personal requirement on 26th June, 2002. In further, it has said that the petitioner returned Rs. 10,000/- only but not the rest in spite of admitting the loan. As a result whereof, the informant had to file the first information report on 03rd September, 2005. It appears that the date is after about three years three months from the date of taking alleged loan. The first information report has been lodged u/s 406 of the Indian Penal Code. Section 406 I.P.C. is in respect of punishment for criminal breach of trust, whereas, Section 405 I.P.C. is giving definition of criminal breach of trust. Section 405 I.P.C. is as follows:-

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".

Explanation 1.-- A person, being an employer of an establishment whether exempted u/s 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's 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 employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 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.

2. The offence u/s 405 I.P.C. is non-cognizable, bailable, non-compoundable and triable by Magistrate of the First Class. But since the first information report has been lodged u/s 406 I.P.C., the same is cognizable, non-bailable, compoundable and triable by the Magistrate of the First Class.

3. The ratio of State of Haryana and others Vs. Ch. Bhajan Lal and others, said that the power under Article 226 of the Constitution of India will be sparingly exercised and that too in the rarest of rare cases. From the guidelines in the judgement, we found non-cognizable offence, where no investigation is permitted by the police without the order of the Magistrate as contemplated u/s 155(2) of Cr.P.C., can be a good ground for consideration. Therefore, we can not straight way say that by applying the ratio of State of Haryana and Ors. v. Ch. Bhajan Lal and Ors. (supra) the first information report will be quashed without considering other aspects of the matter. The other aspects have also been considered by the Supreme Court on numerous occasions. In 2002 SCC 129 (S.W. Palanitkar and Ors. v. State of Bihar and Anr.) the Supreme Court held that without mens rea a breach of trust may not result in criminal breach of trust. Every breach of trust may not result in penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong, in respect of which the person wronged may seek his redress for damages in a civil court, but a breach of trust with mens rea gives rise to a criminal prosecution as well.

4. In *Kailash Kumar Sanwatia Vs. The State of Bihar and Another*, the Supreme Court held that following ingredients of offence are to be treated as criminal breach of trust;

(1) Entrusting any person with property, or with any dominion over property.

(2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so as to do in violation-

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of trust.

5. In *Roshan Lal Raina Vs. State of Jammu and Kashmir*, we found that proof of entrustment is the basic ingredient for the proof of guilty of offence of criminal breach of trust. However, such reference is arising out of Section 409 I.P.C.

6. The learned Counsel appearing for the caveator contended that he should get further opportunity to file an affidavit and to specify the case why the first information report has been lodged u/s 406 I.P.C., We are sorry to say that we can not accept such submission of the caveator for the simple reason that this Court is not the investigating court but a court of natural justice. The court of natural justice is to apply the mind on the basis of natural justice on a prima facie case. In the instant case, the caveator has been allowed to expire a period of three years three months without instituting a civil suit for the purpose of recovery of the said sum of Rs. 50,000/-. On the other hand, it is not understandable to this Court why the money has not been refunded in spite of promise allegedly made by the petitioner to the respondent No. 4.

7. According to us, there is a thinner line in between a breach of trust and a criminal breach of trust and such thinner line is nothing but mens rea. Only the investigating agency can be able to understand the mens rea. Therefore, the High Court under the scheme of natural justice can only test the bonafide in the following manner;

a) Subject to deposit of Rs. 40,000/- by the petitioner to the respondent no. 4 within a period of one month from the date of communication of this order, there will be stay of his arrest in Case Crime No. 337 of 2005, u/s 406 I.P.C., Police Station Kotwali, District Etawah till the filing of the charge-sheet, if any.

b) The investigating officer will make all possible efforts to conclude the investigation within three months of the date, on which a certified copy of this order is served upon him. Petitioner will make all possible co-operation to the investigating agency to complete the investigation.

c) If the investigating officer and/or informant found himself aggrieved due to falsification, misstatement, fraud, non-cooperation with the investigating officer or any other reasons whatsoever relevant for the purpose, he/she/they is/are at

liberty to apply for recalling/variation/vacating/ modification of the order.

8. Thus, the writ petition stands disposed of.

9. However, no order is passed as to costs.