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In the Bombay High Court

Case No : Criminal Appeal No. 398 of 1980

Sampat Shripat Lambate APPELLANT

Vs

Suresh T. Kilachand and Another RESPONDENT

Date of Decision : 21-08-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468
Penal Code, 1860 (IPC) — Section 406, 409

Citation : (1991) 3 BomCR 688 : (1991) MhLj 1355

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : A.G. Deshmukh, for the Appellant; R.M. Mirza, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—This is an appeal that has been pending since the year 1980 and is part of a group of 12 companion appeals. The matter is one of some seriousness in so far as the appellant who is the Secretary of the Digvijay Mills Employees Co-operative Credit Society Ltd., has assailed the correctness of the judgment and order of the learned Metropolitan Magistrate, 6th Court, Mazagaon, dated 3-5-1979, acquitting the accused.

2. The complainant before the Trial Court in his capacity as Secretary of the Digvijay Co-operative Credit Society Ltd., filed a complaint u/s 147(b) of the Maharashtra Co-operative Societies Act, 1960 and section 409 read with section 114 of the Indian Penal Code against the chairman and Manging Director, the Directors and the Secretary of the Digvijay Mills Ltd. The complainant stated that the Society used to advance loans to the members who are the employees of the Mills and that there existed an arrangement/agreement under which the loans were to be repaid in installments by the employees out of their wages. The mills were required to deduct these installments out of the wages and credit the same to the Society. The complaint was that several of the amounts so deducted from

the wages had not been paid over to the Society and that, consequently, the offences in question have been committed.

3. It is very relevant in this case to point out, that the facts are not at all in dispute. The trial Court discharged accused Nos. 2 to 8 and they are, therefore, no longer before this Court as that order became final. The trial proceeded only against the original accused No. 1 who was the Chairman and Managing Director of the Mills. In his statement, the accused No. 1 has stated as follows :

"I was the Chairman of the Board of Directors of Digvijay Mills. There was a Society Digvijay Co-operative Credit Society Ltd. This Society used to advance loans to its members. There was an agreement between the Society and the Mill under which the dues payable to the Society were deducted from the monthly wages payable to the workers. I do not know whether the mill used to receive monthly statement of account payable to the Society. In the month of June 1964, whatever less amount was paid than the actual deducted due to financial difficulties of the mill the whole amount could not be paid to the Society."

The statements in all 12 cases are identical except for the fact that the period differs. It is, therefore, relevant to point out that the agreement is admitted. The fact that the accused was responsible for the implementation of the agreement is admitted and the fact that the amounts in question were deducted from the wages is also not disputed.

4. On behalf of the prosecution, the formal oral evidence was adduced by the complainant who deposed about the agreement and who has also produced the relevant figures in respect of the period in each of the 12 cases. The fact that the amount was deducted from the wages of the employees by the mill and not paid over to the Society has been deposed to by him, and as indicated by me earlier, has not been disputed by the accused. In order to support this version a second witness has been examined who has deposed to the effect that the physical deduction from the wages in respect of the loan advanced to him had in fact been made. The prosecution case, therefore, stands fully established and normally, there would be no ground on which the accused could have been acquitted on the basis of this material before the trial Court.

5. The learned Magistrate has proceeded on a two-fold approach. In the first instance, he has acquitted the accused of the charge u/s 147(b) of the Co-operative Societies Act on the ground of limitation. I do not propose to interfere with that part of the order as the main charge is the one with which we are essentially concerned. As far as this charge is concerned, the learned Magistrate framed a charge u/s 406 I.P.C. simpliciter and the learned Magistrate took the view that since the complaints were filed beyond the period of three years, that there was the bar of limitation u/s 468 of the Code of Criminal Procedure and that, consequently, the accused are entitled to an acquittal. It is necessary, in this regard, to mention two things : the first of them being that even assuming that section 406 I.P.C. applies that the charge against the accused was to the

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effect that he has wrongfully retained the funds deducted on behalf of the Society and not credited the same. To this extent, though the offence has been committed on the date when the amount has been deducted and wrongfully retained, it is necessary to bear in mind the fact that the offence is a continuing one in so far as it continues for such period of time as the accused has wrongfully retained the amounts in question. The non-deposit of the amount with the Society and the wrongful retention of the same constitute an offence and it cannot, therefore, be argued that the complaint filed under these circumstances is outside the period of limitation.

6. Mr. Deshmukh, learned Counsel appearing on behalf of the appellant has raised a second submission which, to my mind deserves to be upheld. Mr. Deshmukh has pointed out that in the circumstances in which the accused was placed, that section 409 I.P.C. would in fact apply to the facts of this case and that, consequently, the question of any bar u/s 468 I.P.C. would not arise at all. A perusal of the wording of section 406 I.P.C. would indicate that the submission of Mr. Deshmukh which is to the effect that the accused was functioning in his capacity as an agent of the Society under the agreement for purposes of making the deductions and thereafter crediting the same to the Society, that he would clearly by liable for an offence committed u/s 409 I.P.C. To this extent, therefore, the reasoning of the learned Magistrate that the accused is entitled to the benefit of the provision of limitation u/s 468 Cr.P.C. is unjustified and is liable to be set aside.

7. The learned Magistrate has also relied on the decision of the Calcutta High Court in the case of Nathumal v. Salil Khan, reported in 1971 Criminal Law Journal, page 361. In dealing with a case relating to deductions under the Employees State Insurance Act, the Calcutta High Court took the view that even if the penal provisions of the Act were attracted, that the same would not come within the ambit of section 405 I.P.C. With utmost respect to the learned Judges, I am unable to agree with the said reasoning. A simple perusal of the provisions of section 406 I.P.C. which defines criminal breach of trust very clearly specifies that a person who is in any manner entrusted with property or with dominion over property would be liable. Moreover, I have had occasion to refer to the explanations 1 and 2 to section 405 I.P.C. which amply clarify the position that on the facts of the present case, the offence of criminal breach of trust can clearly be said to have been made out. It is necessary, however, to take note of the fact that these explanations were added by amendments in the years 1973 and 1975. It would, therefore, make the position rather fluid in so far as the amendments were not on the stature book at the time during the period covered by the offences. However, the amendments had come into force in the year 1979 when the judgment was delivered. Furthermore, in the view that I have taken that it is a continuing offence, this position would not make any difference.

8. There can be no doubt whatsoever that the accused, in the present case, who admittedly, had dominion over the funds which fact again has not been disputed

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by him, was certainly liable for the offences with which he stood charged.

9. I find from the record of this case that a passing reference has been, made to the effect that the Mills were in financial difficulties. No evidence of this type has been brought before the Court as to what exactly were the nature of the financial difficulties nor has any evidence been brought before the trial Court to indicate as to how and under what circumstances the financial difficulties of the mill could justify the criminal offence of breach of trust. Admittedly, through this entire period, the mills were working and the workers have been paid their wages, the amounts deducted out of the wages would normally have been disbursed to the workers but the amounts were instead retained by the accused for purposes of credit to the Society and, therefore, to my mind, the so-called nexus between the financial difficulties that have been referred to and the commission of the offence is wholly irrelevant.

10. The learned Magistrate has overlooked the fact that in this particular case, the complainant had applied for sanction to prosecute the accused u/s 143 of the Maharashtra Co-operative Societies Act and that the sanction was granted by the State Government on 22-6-1972. The complainant had wrongly consolidated the entire amount of Rs. 1,22,665.26 and filed a single complaint which was not maintainable and was, required to re-file the complaints in the year 1975 after bifurcating the same in keeping with the provisions of section 219 of the Cr.P.C. This factor ought to have been taken into account by the trial Court before upholding the plea of limitation.

11. The learned A.P.P. has very strongly argued that technical pleas should not be permitted in respect of serious offences of the present type. He has pointed out, that there was virtually no defence to this case before the trial court, that there is no substance in the plea of limitation canvassed and that on facts, it is unequivocally admitted by the accused that he was in charge of the management of the mills, that the amounts in question had been deducted and not paid over to the Society. The learned A.P.P. submitted, that the courts must, of necessity, take a very serious view of cases of the present type and that a deterrent punishment is called for.

12. In the result, the appellant is entitled to succeed. The judgment and order of the trial Court is set aside. The original accused - respondent No. 1 is convicted of an offence punishable u/s 409 I.P.C. In the facts of this case, it would not be appropriate, at this late point of time and having regard to the changed circumstances, to impose a jail sentence. However, it is directed that the accused shall pay a fine in the sum of Rs. 80,000/- in default to suffer R.I. for two years. The fine in question shall be paid by the accused to the trial court within a period of 12 weeks from today. Out of the fine, is recovered, an amount of Rs. 78,811.27 be paid over to the Digvijay Mills employees Co-operative Credit Society Ltd. Appeal allowed accordingly.

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