(2015) 04 CAL CK 0017

In the Calcutta High Court

Case No : CRA 122 of 2001

Satyanarayan Chakraborty and Others APPELLANT

Vs

State of West Bengal RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 218, 219, 468
Penal Code, 1860 (IPC) — Section 120B, 409, 468

Citation : (2015) CriLJ 2883

Hon'ble Judges : Subrata Talukdar, J.

Bench : Single Bench

Advocate : Dipak Sengupta, Sisir Kumar Bhowmick, Dipankar Aditya and Amritendu Bhowmick, for the Appellant; Anand Keshri, Advocates for the Respondent

Final Decision : Allowed

Judgement

Subrata Talukdar, J.—The present appeal is directed against the judgement and order of conviction dated 23rd February, 2001 passed by the Ld. Second Special Court at Howrah in Special Case No. 6 of 1997 thereby convicting the appellants under Sections 409, 468 and 120B of the Indian Penal Code.

2. Sri Dipak Sengupta, Ld. Senior Counsel appearing for the appellants takes this Court elaborately through the evidence recorded at the trial. It is the primary contention of the Ld. Senior Counsel that the Ld. Trial Court had failed to appreciate the evidence on record in its proper perspective. The evidence on record does not show the proximate nexus of any of the appellants with the alleged offences.

3. It is the relevant to mention that the offences alleged against the appellants relate to three accounts namely, failure to deposit the Provident Fund in respect of the teaching and non-teaching staff of the school in question being the Belgachia Mahatma Aswini Dutta Vidyapith (for short the said school) to the Provident Fund account although such Provident Fund was deducted from their

salaries for the month of December, 1988. The Provident Fund amount was Rs. 3,923.25 paise and was shown in the Provident Fund Acquittance Roll.

4. The second charge pertains to breach of trust and misappropriation of the Professional Tax amount of the staff of the said school. Such alleged defalcation was detected during the audit.

5. The third charge pertained to illegal withdrawal of money allocated for National Cadet Corps (for short NCC) and opening of an illegal account in respect of such NCC money.

6. Other charges relate to illegal tampering of Resolution Book of the Managing Committee of the said school as well as forgery connected to the Resolution Book.

7. One of the accused, Satyanarayan Chakraborty was described as the then Secretary of the said school. The second accused, Chandra Nath Ganguly was described as the Officiating Headmaster and the third accused, Astick Kumar Baitalik was a teacher with the said school.

8. All the three accused are the appellants before this Court and represented by Sri Sengupta, Ld. Senior Counsel. At the very outset Sri Sengupta invites this Court to consider the legal position that one of the charges pertain to non-payment of Professional Tax which is an individual liability and no criminal offence can be imputed in respect thereof any person described to be in charge of general administration. Ld. Senior Counsel argues that the dues with regard to Professional Tax, if any, belong to the domain of individual staff members and it was no obligation of the appellant Nos. 1 and 2 namely, Satyanarayan Chakraborty and Chandra Nath Ganguly to deposit the same.

9. Ld. Senior Counsel further argues that there is no allegation with regard to the quantum of the alleged misappropriation. None of the appellants have been appointed as the Drawing and Disbursing Officer (for short DDO) in respect of any of the funds of which defalcation is alleged.

10. Drawing the attention of this Court to the third charge that is alleged misappropriation of NCC funds, Sri Sengupta strenuously argues that the local Commandant was the appointed DDO. There is no misuse of NCC funds which have been alleged and the NCC activities in the said school were carrying on as before.

11. On the charge of Section 468 IPC, Ld. Senior Counsel points out that in the facts of the present appeal such charge is presumptive. There is no identification, as would appear from the evidence, with regard to the individual who allegedly tampered with the Resolution Book. At no stage of investigation and trial it was found necessary to appoint a handwriting expert to examine the alleged interpolation in the Resolution Book.

12. The next plank of Sri Sengupta''s submission is that no conviction has been recorded under Section 120B IPC. In such view of the matter in the absence of

any conspiracy found against the appellants, it is impossible to assume that the appellants acted individually in respect of three separate categories of funds viz., Provident Fund, Professional Tax and NCC in carrying out the alleged irregularities.

13. Sri Sengupta next argues that the classes of individuals specified under Section 409 IPC do not cover the appellants. Taking this Court to the provisions of Section 409 IPC Ld. Counsel clarifies that the appellants are not public servants or any of the alternative classes of persons deemed to be acting as public servants to attract the application of Section 409 IPC.

14. Ld. Senior Counsel submits that it is essential for a charge under Section 409 IPC to be proved that entrustment of the article/property in issue has taken place. In the facts of the present case no specific entrustment in respect of any of the heads of accounts on which charges have been framed in the cases of the individual appellants could be proved. On the other hand, there has been a mere narration of the affairs of the said school by the complainant viz., one Shanti Ranjan Hazra, a former President of the said school.

15. Sri Sengupta now takes this Court to the evidence to demonstrate on facts the tenability of the above noted legal points argued by him in this appeal.

16. From the evidence of PW1, who is the complainant, Sri Sengupta submits that PW1 does not claim any special knowledge of the handwriting in the Resolution Book in respect of which he alleges tampering.

17. Ld. Senior Counsel further points out that the appellant No. 2, Chandra Nath Ganguly neither appears to be the teacher-in-charge nor the Officiating Headmaster from the evidence of PW1. No documents have been relied upon in the evidence of PW1 to show that the appellant No. 2 acted as the teacher-in-charge or the Officiating Headmaster.

18. Arguing that the present case is a case on documents primarily, Sri Sengupta draws the attention of this Court to the B series of Exbts. for making the point that the post held by the appellant No. 2 was one of Assistant Headmaster. There is no material document on record to show that the appellant No. 2 took over charge as the Headmaster of the said school. Ld. Senior Counsel therefore argues that in the absence of a definite role ascribed to the appellant No. 2 in the administration of the said school, the charge of misappropriation, forgery and breach of trust can only be presumptive.

19. Further taking this Court to the evidence of PW2 Sri Sengupta argues that such evidence is only material for the purpose of assessing the charge of defalcation of NCC funds. With respect to PW3 Ld. Senior Counsel submits that he is a tendered witness.

20. With respect to PWs 4 and 5 Sri Sengupta submits that both of them gave evidence in tandem. PW5 is the Headmaster and the documents procured by PW5 for the purpose of nailing the appellants were handed over to PW4 in the

corridor of the courts prior to the latter''s deposition. In essence the evidence of PW4 is the hearsay evidence of PW5 or, in other words PW4 acts as the mouthpiece of PW5.

21. Demonstrating the animus of PW4 to appellant No. 2, Ganguly, Sri Sengupta argues that the latter objected to the discharge of duties by the former in another college, viz. N.D. College simultaneously to the name of PW4 appearing in the official register of the said school. Ld. Senior Counsel therefore argues that the evidence of PW4 must be viewed from the point of such animus and is obviously coloured to nail the appellant No. 2, Ganguly.

22. Referring to the charge in respect of the misappropriation of NCC Funds Sri Sengupta points out that the NCC activities are still continuing in the said school with the approval of both the NCC and the said school authorities. From the Resolution Book it will transpire that the reason for contemplating stoppage of NCC activities was not the misuse of funds but the dearth of required personnel/ teachers. It will be also evident from the cross-examination of PW5, Dilip Dhara, the then Headmaster appearing at page 39 of the paper book that there is no reference to NCC in the audit report. Axiomatically therefore the NCC activities and accounts constitute an area of activity where nothing was found amiss.

23. Next taking this Court to the evidence of PW6, a member of the Managing Committee of the said school, Sri Sengupta makes the point that prior to the alleged functioning of the appellant No. 2, Ganguly, as the Headmaster of the said school, one Amal Krishna Sarkar functioned as the Headmaster till August, 1990. There is no document on record to show that the appellant No. 2, Ganguly took over charge as the Headmaster of the said school from the said Amal Krishna Sarkar. Therefore, in the absence of a definite allocation of responsibilities in favour of the appellant No. 2, Ganguly, it cannot be presumed that he was responsible for handling both Provident Fund and the Professional Tax accounts.

24. From the evidence of PW9, the then Assistant Sub-Inspector of Schools, Sri Sengupta points out the Ledger pertaining to the financial affairs of the said school was not produced. Moreover there is no evidence forthcoming with respect to the activities of the Financial Sub-Committee of the said school which, by its nomenclature, was responsible for overseeing the financial affairs of the said school.

25. Similarly, from the evidence of PW11 Sri Sengupta points out that he was the Professional Tax Officer at the relevant point of time and it transpires that the relevant file to prove that the Professional Tax amount was not deposited for the period June 1990 to January 1991 was not produced. Furthermore, PW11 testifies to the fact that the Professional Tax is a personal account of an individual.

26. Therefore, Sri Sengupta makes the point that it was necessary for the prosecution to prove through various documents that the alleged financial

irregularities have been actually committed by the appellants. In the absence of the best documentary evidence the charges can at best be presumptive and can be related to the personal animus of the complainant against the appellant Nos. 1 and 2, who were his political rivals belonging to the same political party.

27. Therefore, Sri Sengupta urges this Court to set aside the judgement and order of conviction and allow the appeal.

28. Per contra, Sri Anand Keshri draws the attention of this Court to pages 66-68 of the records being a letter dated 21st January, 1991 addressed by the appellant No. 1 in his capacity as the secretary of the said school to the officer-in-charge, Liluah Police Station and another letter dated 27th August, 1990 addressed by the appellant No. 2 in his capacity as Officiating Headmaster and addressed to the General Secretary, District School Sports Association, Howrah.

29. The first letter, inter alia, states that in connection with an inspection of the school held on 10th January, 1991 by the Directorate of Secondary Education, West Bengal some documents were found missing. Such documents are now in the custody of the teacher-in-charge and Assistant Headmaster, the appellant No. 2. The letter speaks of necessary intervention by the Officer-in-Charge, Liluah Police Station in respect of those missing documents.

30. The second letter dated 27th August, 1990 speaks of steps taken by the appellant No. 2 with respect to the Physical Education Department of the said school.

31. On the strength of the above noted letters Sri Keshri argues that the involvement of the appellants in the offences alleged stand established. Ld. Counsel also submits that admittedly Provident Fund was not deposited and the audit report was not placed. Such facts will appear from the evidence on record. It is also the contention of Ld. State Counsel that at least, if not in the NCC and Professional Tax charges, in respect of the non-deposit of Provident Fund the culpability of the appellant Nos. 1 and 2 is apparent. Replying to Sri Sengupta''s argument on Sections 218 and 219 CrPC Sri Keshri submits that the offences alleged are continuing in nature and stand to be distinguished in such aspect and therefore outside the purview of Sections 218 and 219 CrPC.

32. On the platform of the argument and counter argument as noticed above, this Court is now required to examine the evidence on record. Primary evidence is of PW1, the complainant. In his evidence PW1, inter alia, states that written complaint was lodged on 11th of May 1994 at Liluah Police Station alleging defalcation of money. PW1 however states that at the relevant time one Amal Krishna Sarkar (since deceased) was the Headmaster of the said school. Several documents were seized by the police. However PW1 states that he cannot give the figure of NCC money alleged to be defalcated.

33. PW1 further admits that he was the most influential political person in the locality since 1969 to 1996 irrespective of all political parties. DDO was appointed

in connection with the financial matters of the said school during the tenure of PW1 as President. No written document could be shown by him to confirm that the appellant No. 1 was in charge of encashment and disbursement of money of the said school. He further admits to the fact that he filed another complaint against the appellant No. 1 which is pending before the Ld. Judicial Magistrate.

34. PW1 denies any personal knowledge with regard to the collection of salaries of teaching and non-teaching staff. He also denies any personal knowledge to collection of money on account of Provident Fund and Professional Tax. He has no knowledge whether Professional Tax is an individual payment or not. No paper or Resolution Book has been filed by PW1 to demonstrate that the appellant No. 1 and the appellant No. 2 were in charge of the drawing and disbursement of the salaries of staff of the said school. PW1 further admits to the fact that the Financial Sub-Committee is dealing with the financial matters. Such Financial Sub-Committee has been formed on the basis of resolution of the Managing Committee.

35. PW1 also states that no independent auditor was appointed by him to verify the accounts by an auditor. As president he did not hold any meeting with persons responsible for preparing the accounts and the audit.

36. PW1 states and, such statement assumes significance in the context of the charges against the appellants which is therefore reproduced below:-

"I presumed (emphasis added) that the accused persons have defalcated/ misappropriated the PF.PT. and NCC money". 37. PW1 also admits of the fact that by letter of the DPI dated 30th April, 1986 there was a strong recommendation to continue NCC in the said school. Similarly another letter was received from the NCC authorities dated 25th May, 1988 strongly recommending the continuance of NCC. He further admits as follows:-

"I have not filed any paper to show that Chandra Nath Ganguly and Astik Baitalik were the authority for encashment and disbursement of NCC amount. I do not know whether commanding officers of NCC 41, Bengal Battalion are the Drawing and Disbursement Authority of NCC money. I have not filed papers to show Chandranath Ganguly is a member of Financial Sub-Committee of the school...

Santosh Babu, the clerk of the school used to prepare the Acquittance Roll."

38. PW1 admits that he has no supporting documents to show whether the appellant Nos. 1 and 2 were in charge of financial affairs of the said school. In his capacity as the President of said school PW1 did not call upon the appellant No. 1 to produce the audit report before the Managing Committee.

39. PW2, being the Secretary, Bantra Co-operative Bank Ltd. also admits that the account of the school was opened in the Bank in usual and normal procedure and no fictitious or fraudulent methods were adopted.

40. PW4 is the Assistant Teacher of the said school. PW4, inter alia, states as

follows:-

"This is the challan containing three pages showing deposit of P. Tax under the signature of the then Secretary, S.N. Chakraborty. I know the signature of Satyanarayan Babu (marked 16, 16/1, 16/2). These are the four receipts and challan showing the then Officiating Headmaster C.N. Ganguly deposited PF amount. I can identify the signature of C.N. Ganguly which is marked Exbt. 17, 17/1, 17/2 and 17/3. During tenure of C.N. Ganguly, the Officiating Headmaster of our school some documents have been stolen away. As such the then Secretary, S.N. Chakraborty lodged the G.D. at Liluah P.S. on 15.01.91. The letter was written on 21.01.91. The document is marked Exbt. 18." 41. PW4 further admits as follows:-

"The papers which I have proved and marked Exbt. Have been handed over to me by the present Headmaster Dilip Dhara in the verandah of the court. The relevant papers which were required in this case I called for from Headmaster who handed over it to me before my deposition." 42. PW4 admits that he was a teacher of N.D. College during day time. He also admits to the fact that he did not take payment from the DI of Schools to teach at N.D. College and also did not recollect that the appellant No. 2 objected to his teaching at N.D. College.

43. PW5, Dilip Kumar Dhara is the Headmaster of the said school. PW5 states, inter alia, that along with the retired Headmaster, Amal Sarkar (since deceased) the appellant Nos. 2 and 3 operated the NCC account in their personal capacity. However, he also admits that he has no knowledge whether NCC accounts fall within the administrative payment of the said school under the Headmaster''s Manual. He further admits to the fact NCC is still continuing. In the audit report which has been filed in court there is no reference to NCC accounts. By a notification dated 13th July, 1989 from the DPI it has been directed that the NCC allowances shall be controlled by the Commanding Officer of the respective NCC units. PW5 significantly states in his cross-examination as follows:-

"During the time of defalcation I did not join in the school. I have no direct knowledge of it... I have no personal knowledge who issued the cheque during the period complained of... After my joining I did not verify audit report by an expert." 44. PW6 who claimed to be a member of the Managing Committee of the said school admits that the NCC account had no connection with the school account. He further admits to the fact that in the absence of the Secretary and Headmaster of the said school he used to put a signature on the cheque at the time of drawing of the salary of teachers and non-teachers of the said school.

45. PW8, Santosh Kumar Dey deposed as a clerk of the said school. He significantly states in his cross-examination as follows:-

"As Amal Krishna Sarkar, Headmaster did not give me to deposit the Provident Fund money for the month of December, 1988 so I did not deposit it in the Bank.... All salary acquittance bill was prepared and written by me. It is fact the preparation of Provident Fund and Professional Tax is a part of acquittance bill."

46. He adds that the preparation of acquittance roll and to maintain the school register is done by him as per direction of the Secretary and the Headmaster. He is also responsible for maintaining the cash book.

47. PW9, Smt. Tripti Chowdhury deposed as the Assistant Sub-Inspector of School, Sadar Sub-Division, Howrah. PW9 admits that the ledger in respect of the school accounts has not been produced in court. She also admits that the Financial Sub-Committee of the said school is dealing with the financial matters. She states that the salary account in respect of the teaching and non-teaching staff has to be mentioned in the cash book.

48. PW11 Smt. Ranu Samaddar, deposed as the Professional Tax Officer. PW11 also deposes that the relevant file to prove that the Professional Tax amount has been deposited for the period between June 1990 to January 1991 has not been produced. She admits to the fact that Professional Tax is a personal responsibility of an individual.

49. PW13 is the investigating officer of the case and admits in his cross-examination as follows:-

"I did not examine any person of DI of school, Howrah to find out that if C.N. Ganguly was approved to act as Officiating Headmaster of the school. I had no occasion to go through the proceedings of the Financial Sub-Committee of the school. I did not send the alleged hand writing of C.N. Ganguly to the handwriting expert. I have no occasion to find out whether C.N. Ganguly was the member of Financial Sub-Committee or Managing Committee of the school during that period. I did not receive any voucher/receipt showing that accused Astik Baitalik received NCC amount during the period of June 1990 to January 1991. I did not seize the Cash Book of the school because of the fact of the defalcation was detected in the audit report. I did not examine the auditor. I did not peruse the document which was perused by the auditors. I did not query that who collected the bank money for the teaching and non-teaching staff of the school for disbursement. I did not ascertain to put his signature on the reverse side of the cheque for collection of salary". 50. PW13 also deposes that no student was examined by him to ascertain whether they received any NCC money. He admits that the said school is not a government school.

51. Having heard the parties and considering the evidence on record this Court finds that in each of the three heads of account in respect of which offences were sought to be made out against each of the appellants is not complete. As recorded above in this judgement from the evidence of the PWs the responsibility for handling each of the said three heads of accounts namely, PF Account, Professional Tax and NCC Account cannot be laid at the hands of the appellants exclusively and separately. From the evidence on record it also transpires that none of the appellants were acting as the Drawing and Disbursement Officers of the said school. The financial matters were handled by a Financial Sub-Committee.

52. PW1 has also expressed his lack of knowledge about the operation of the Provident Fund Account and whether the Professional Tax is an individual payment. No knowledge of the audit report has been demonstrated by PW1. Significantly, PW1, the complainant himself, has gone on record that there is only a presumption that the accused persons have misappropriated under different heads of accounts.

53. This Court also finds substance in Sri Sengupta''s argument that the evidence of PW4 is merely an extension of what PW5 intended to allege against the appellants. The motive for PW4 to insinuate against the appellants, particularly the appellant No. 1, is apparent from the objection raised by the appellant No. 1 to the discharge of duties by PW4 in a separate college while continuing to be in the rolls of the said school.

54. This Court also notices that in connection with the allegations pertaining to accounts that important documentary evidence such as ledger and the file could not be produced and such would appear from the evidence of PW9 and PW11. Furthermore, having regard to the evidence on record that it is the duty of the clerk of the said school to prepare acquittance roll and to maintain several registers and, admittedly there being no direct evidence alleging tampering with the Resolution Book and neither any handwriting expert was appointed, Sri Sengupta''s further argument that the charge under Section 468 IPC is presumptive cannot be discarded.

55. The culpability of the appellants with regard to the payment of Professional Tax, which is admittedly an individual liability could not be proved. With respect to the NCC fund evidence is on record that the Commanding Officer has been appointed as the DDO and in the absence of any incriminating evidence showing misuse of NCC funds as well as the continuance of NCC activities in the said school, the finding of misappropriation/defalcation against the appellants is hard to conceive.

56. From the arguments of Ld. State Counsel pointing to pages 66 and 68 of the Exbts. file (supra), accepting for the sake of argument that the appellant No. 2 discharged for a period of time the duties of Officiating Headmaster of the said school, it cannot be gathered that there was ipso facto any modicum of culpability in misuse of funds.

57. From the letter dated 21st January 1991 (supra) at page 66 it will appear that the appellant No. 1 showed his concern with regard to the production of certain documents pertaining to the said school and such concern was duly communicated to the Officer-in-Charge, Liluah Police Station. However, from the contents of the said letter it does not transpire that in any measure the complaint of PW1 stands substantiated.

58. Further in view of the fact that since the school was not a government school as per evidence on record, the argument of Sri Sengupta that Section 409 IPC will not be automatically attracted in the case of the appellants since they are not

public servants or any of the alternative classes of persons to whom the penal clauses of Section 409 IPC can apply is worthy of acceptance.

59. It is also noted that in order to attract the criminality of breach of trust, it is important to prove that entrustment had taken place. However, in the facts of the present case the evidence on record does not show exclusive entrustment of any of the funds in issue with the appellants. On the contrary there is no direct evidence or a complete chain of evidence linking the appellants with the embezzlement of the said funds. It is also relevant to add that vital documentary evidence necessary to slap a conviction on the charge of financial irregularities such as the cash book or the audit report could not be examined. Rather the facts indicate an animus on the part of PW1 against the appellant Nos. 1 and 2 to snare then in a false complaint stemming from competing political interests which is also apparent from the records.

60. For the above reasons the impugned judgement and sentence of conviction dated 23rd February, 2001 passed by the Ld. Second Special Court, Howrah in Special Case No. 6 of 1997 convicting the appellants stands set aside.

61. The appellants stand acquitted of the charges and shall be discharged from their bail bands, if any.

62. CRA 122 of 2001 stands accordingly allowed.

63. Let the Lower Court Records be sent down forthwith.

64. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

