

(1994) 10 CAL CK 0008
In the Calcutta High Court
Case No : Criminal Appeal No. 490 of 1988

West Bengal Small Industries Corporation Ltd.	APPELLANT
Vs	
Hazarilal Acharya	RESPONDENT

Date of Decision : 03-10-1994

Acts Referred:

Penal Code, 1860 (IPC) — Section 313, 405, 406

Citation : (1995) 2 ILR (Cal) 173

Hon'ble Judges : R. Bhattacharyya, J

Bench : Single Bench

Advocate : Shyam Sundar Dutta and L.K. Banerjee, for the Appellant; Jharna Biswas, for the Respondent

Final Decision : Allowed

Judgement

R. Bhattacharyya, J.—This Criminal Appeal is directed against order of conviction and sentence passed by the learned Judicial Magistrate, Fourth Court, Alipore, in C/ 27/83 for an offence committed u/s 405 of the Indian Penal Code, dated May 31, 1988.

2. The learned Court below since acquitted the accused and the present appeal is the result thereof for reversal of the order of conviction and sentence.

3. An introduction to the facts is necessary for appreciation of the points urged in the appeal.

4. One Hazarilal, the accused, entered into a higher purchase agreement with the West Bengal Small Industries Corporation for purchase of machinery subject to fulfillment of certain conditions.

5. It is needless to repeat that the accused could not fulfill his obligation under the higher purchase agreement, for which proceedings under the Public Demand Recovery Act was initiated and he paid a sum of Rs. 400. Ultimately, he failed to pay installments and alleged to have removed the machine, for which a

complaint was initiated u/s 405 of Indian Penal Code. Thereafter, a charge was framed u/s 405 of Indian Penal Code which was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried.

6. During the currency of the trial only three witnesses were examined to found the charge, but none was examined on behalf of the defence.

7. The trial Court on conclusion of the evidence and in consideration of the defence agitated and the examination of the accused recorded u/s 313 of the Indian Penal Code acquitted the accused against which this Appeal for the relief indicated above.

Decision with reasons:

8. The moot question that emerges from the record for decision is as to whether the case of entrustment has been proved in accordance with law.

9. Mr. Dutta, the learned Advocate for the Appellant, in attacking the order of acquittal has intransigently argued that the approach of the learned Court below to the case is wrong, its treatment to the case is wrong and the mode and manner of assessment of evidence is wholly unwarranted as the assessment of the evidence overrides the provision of law.

10. The learned Court below, according to him, is very much influenced in deciding the case about the removal of the machine which admittedly the Respondent was in possession thereof founded on an agreement. There is no dispute about the machinery being received by him, but the fact remains that the machineries are not available as agitated by him.

11. This has been refuted by the learned Counsel for the Respondent, Mr. Biswas, on the footing that there is no creditworthy evidence about the removal of the machine from the place of business at Sura Cross Lane, Calcuta-10. The removal of the machine, according to the learned Court below, has not been proved which pushes the case of the prosecution to impossible. The removal of the machineries, since not proved by the prosecution, has thrown the case overboard. He has taken support from *S. Mitter v. State* 61 C.W.N. 210 to contend that mere failure to pay installments following higher purchase agreement on the basis of which the accused was entitled to keep and possess the article which was the subject-matter of hire provided he fulfilled the other condition of contract, will not make out a case of criminal breach of trust. Mere breach of hire agreement without more cannot form the subject-matter of a criminal breach of trust (sic).

12. The ratio decidendi in *S. Mitter* falls on a different premises where the Court held, that violation of conditions under the agreement of higher purchase does not afford any criminal breach of trust as the relationship between the parties is being governed by an agreement. The Court also held that removal of some sticks would not constitute criminal breach of trust.

13. The case at hand is not all. fours to the facts involved in the ruling under reference. Here the case is altogether different which has a distinguished feature. It is admitted on all hands about the entrustment which is the first part of Section 405 of the Indian Penal Code.

14. It is well-established by a cantina of decisions that in an offence for criminal breach of trust, it involves two clear distinct parts. The first part stems out of an obligation in relation to the property over which dominion or control is acquired by the accused. This part is an important part as the entrustment is the sine qua non of an offence u/s 405. The second part flows from the first part inasmuch as misappropriation or dealing with the property dishonestly and contrary to the terms of obligations created constituting an offence of misappropriation. In my view, in an offence under the criminal breach of trust, entrustment is the sheet-anchor which has been proved beyond shadow of doubt. Law does not encompass in absence of sound proof of removal of machinery about the breach but proof of entrustment to the satisfaction of Court cannot whittle away the charge and the offence complained of.

15. I cannot agree with the learned Court below that the removal since not proved, the charge fails through and the accused is absolved from liability.

16. Much to my surprise, I find that the accused to demolish the case of the prosecution refrained from taking legal steps in the matter and the law provides that the party in possession of best evidence must bring it to the notice of the Court for enlightenment of the facts. It has been thoroughly disputed about the removal of machinery which did not gain ground for the conduct of the accused which is a very relevant factor in this case as the primary obligation, the prosecution has discharged.

17. I asked the learned Counsel for the Respondent if she was agreeable on behalf of her client to produce any other evidence about the non-removal of machineries to which her answer was in the negative. But I am not unmindful that negative is not the positive as the fabric of the criminal trial speaks of onus which primarily lies on the prosecution to prove the charge.

18. So far as the case is concerned, the evidence about entrustment is free from holes. Thus, taking into consideration the fact and law, I am unable to persuade myself to agree with any of the findings of the learned Court below.

19. Accordingly, I set aside the order of acquittal and substitute it by an order of conviction. Therefore, I convict the Respondent Hazarilal Acharya for committing an offence of criminal breach of trust coming within the fold of Section 406 of the Indian Penal Code and sentence him to undergo R.I. for one year and is liable to pay a fine of Rs. 500, in default, further R.I. for two months.

20. Accordingly, the appeal succeeds and the order of acquittal stands set aside.

21. The accused must surrender to custody to serve out the sentence.