

THE INDIAN PENAL CODE

CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

Of Criminal Misappropriation of Property

[s 404] Dishonest misappropriation of property possessed by deceased person at the time of his death.

Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

ILLUSTRATION

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

COMMENT—

This section relates to a description of property peculiarly needing protection. The offence consists in the pillaging of movable property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person or officer authorized to take charge of it.²⁷⁴ The very object of this provision was to protect the property which was in possession of deceased at the time of his death till the person(s) entitled to it step in.²⁷⁵

[s 404.1] CASES.—

The circumstances namely recovery of revolver of the deceased from accused, along with live and spent cartridges, the recovery of mobile handset of Panasonic from the custody of the accused, and the fact that the accused was using the same soon after the murder of the deceased with mobile phone which was registered in the name of the accused (and that he continued to use it till his arrest), leaves no room for any doubt, that the prosecution has brought home the charges as have been found to be established against the accused.²⁷⁶ Where the accused misused the ATM card of the deceased, it was held he had committed offence under this section.²⁷⁷

274. M & M 364.

275. *Prabhat Bhatnagar v State*, [2007 Cr LJ 4349](#) (Raj).

276. *Gajraj v State (NCT) of Delhi*, [\(2011\) 10 SCC 675](#) [[LNIND 2011 SC 929](#)] : [2012 Cr LJ 413](#) ; *Munish Mubar v State*, [2013 Cr LJ 56](#) (SC) : [AIR 2013 SC 912](#) [[LNIND 2012 SC 610](#)] . Articles belong to the deceased recovered from the accused based on his disclosure statement. Accused could not offer any explanation. Conviction confirmed by the Supreme Court. *Prakash Alias Ajayan v State*, [2009 Cr LJ 2930](#) (Ker)-Gold chain of deceased recovered from one of the accused. Conviction was held proper. Also see *Ramesh v State of Rajasthan* [\(2011\) 3 SCC 685](#) [[LNIND 2011 SC 213](#)] .

277. *Ashok Kumar Kundi v State of Uttarakhand*, [2014 Cr LJ 378](#) (Utknd).

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Of Criminal Breach of Trust

[s 405] Criminal breach of trust.

Whoever, being in any manner entrusted with property,¹ or with any dominion over property, dishonestly misappropriates² or converts to his own use that property, or dishonestly uses or disposes of that property³ in violation of any direction of law prescribing the mode in which such trust⁴ 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".

278. [Explanation **279.** [1].—A person, being an employer **280.** [of an establishment whether exempted under [section 17 of the Employees Provident Fund 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 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 law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

281. [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.]

ILLUSTRATIONS

- (a) A, being Executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriate them to his own use. A has committed criminal breach of trust.
- (b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.
- (c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys

the direction and employs the money in his own business. A has committed criminal breach of trust.

- (d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.
- (e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.
- (f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

COMMENT—

The basic requirement to bring home the accusations under section 405 are the requirements to prove conjointly i) entrustment and ii) whether the accused was actuated by dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it.²⁸² Two distinct parts are involved in the commission of the offence of criminal breach of trust. The first part consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is the misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created.²⁸³ A trust contemplated by section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the offence under section 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner.²⁸⁴ However, it must be borne in mind that [section 405 IPC, 1860](#) does not contemplate the creation of a trust with all the technicalities of the 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.²⁸⁵

²⁷⁸. Ins. by Act 40 of 1973, section 9 (w.e.f. 1 November 1973).

²⁷⁹. Explanation renumbered as Explanation 1 by Act 38 of 1975, section 9 (w.e.f. 1 September 1975).

²⁸⁰. Ins. by Act 33 of 1988, section 27 (w.e.f. 1 August 1988).

²⁸¹. Ins. by Act 38 of 1975, section 9 (w.e.f. 1 September 1975).

282. *Sadhupati Nageswara Rao v State of Andhra Pradesh*, (2012) 8 SCC 547 [LNIND 2012 SC 461] : AIR 2012 SC 3242 [LNIND 2012 SC 461] ; *Asoke Basak v State of Maharashtra*, (2010) 10 SCC 660 [LNIND 2010 SC 1699] : (2011) 1 SCC(Cr) 85; *Indian Oil Corpn. v NEPC India Ltd*, (2006) 6 SCC 736 [LNIND 2006 SC 537] ; *Pratibha Rani v Suraj Kumar*, (1985) 2 SCC 370 [LNIND 1985 SC 86] ; *Rashmi Kumar v Mahesh Kumar Bhada*, (1997) 2 SCC 397 [LNIND 1996 SC 2178] ; *R Venkatkrishnan v Central Bureau of Investigation*, (2009) 11 SCC 737 [LNIND 2009 SC 1653] .
283. *Onkar Nath Mishra v State*, (NCT of Delhi) (2008) 2 SCC 561 [LNIND 2007 SC 1511] : (2008) 1 SCC (Cr) 507.
284. *Common Cause v UOI*, (1999) 6 SCC 667 [LNIND 1999 SC 637] : 1999 SCC (Cr) 1196.
285. *VP Shrivastava v Indian Explosives Ltd* (2010) 10 SCC 361 [LNIND 2010 SC 920] : (2010) 3 SCC (Cr) 1290; *Jaswantrai Manilal Akhaney v State of Bombay*, AIR 1956 SC 575 [LNIND 1956 SC 40] : 1956 Cr LJ 1116 .

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CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

Of Criminal Breach of Trust

[s 406] Punishment for criminal breach of trust.

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT—

The criminal breach of trust would, *inter alia*, mean using or disposing of the property by a person who is entrusted with or has otherwise dominion there over. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust.²⁸⁶ To constitute this offence there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. 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.²⁸⁷ The offence of criminal breach of trust closely resembles the offence of embezzlement under the English law. Offences committed by trustees with regard to trust property fall within the purview of this section.

A partner has undefined ownership along with other partners over all the assets of the partnership. If he chooses to use any of them for his own purpose he may be accountable civilly to other partners. But he does not thereby commit any misappropriation. A partner may have dominion over the partnership property. But mere dominion is not enough. It must further be shown that his dominion was the result of entrustment. Thus to prosecute a partner the prosecution must establish that dominion over the assets or a particular asset of the partnership was by a special agreement between the parties, entrusted to the accused partner. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or in other words cannot be held to have been entrusted with dominion over partnership properties and without entrustment there cannot be any criminal breach of trust.²⁸⁸ The Supreme Court has reiterated that where a partner is entrusted with property under special contract and he holds that property in a fiduciary capacity, any misappropriation of that property would amount to criminal breach of trust.²⁸⁹

[s 406.1] Ingredients.—

The section requires—

- (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 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 such trust.

This offence consists of any one of four positive acts, namely, misappropriation, conversion, user, or disposal of property. Neither failure to account for breach of contract, however dishonest, is actually and by itself the offence of criminal breach of trust.^{290.}

Sufferance of any loss by the victim is not necessary for leading to a conviction under the section.^{291.}

The section does not require that the trust should be in furtherance of any lawful object. Offences committed by trustees with regard to trust property fall within the purview of this section. Negligence or other misconduct causing the loss of trust property may make the person entrusted civilly responsible, but will not make him guilty of criminal breach of trust.

[s 406.2] Criminal misappropriation and criminal breach of trust.—

In criminal misappropriation the property comes into the possession of the offender by some casualty or otherwise, and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property, and he dishonestly misappropriates the same, or wilfully suffers any other person so to do, instead of discharging the trust attached to it.

1. 'Being in any manner entrusted with property'.—The words "in any manner" do not enlarge the term "entrustment" itself and, unless there is entrustment, the transaction in question cannot be affected by the terms of that section.^{292.} The word 'entrusted' is not a term of law. In its most general significance all it imports is a handing over of the possession for some purpose which may not imply the conferring of any proprietary right at all.^{293.} The natural meaning of 'entrusted' involves that the assured should by some real and conscious volition have imposed on the person, to whom he delivers the goods, some species of fiduciary duty.^{294.} 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 property must have confidence in the person taking the property so as to create a fiduciary relationship between them.^{295.}

Once entrustment is proved, the prosecution has not to prove any misappropriation. It is for the accused to prove in his defence that there was no misappropriation. The offence becomes proved when it is shown that the money has not been applied to the purpose for which it was entrusted.^{296.}

[s 406.3] Customary gifts at engagement, etc.—

Gifts in cash or kind which are customarily given at the time of engagement, *tilak* or marriage ceremony cannot be regarded as an entrustment of items of dowry. No complaint can be presented against the donee in respect of such customary practices.^{297.}

Where a person authorised to collect, delegates his functions to a subordinate of his, and the latter acts in exercise of such delegated authority, any amount that is paid to him would constitute 'entrustment' within the meaning of section 405.^{298.}

[s 406.4] 'Property'.—

The word 'property' is used in the Code in a much wider sense than the expression 'movable property'. There is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in this section or other sections of the [Penal Code](#).^{299.} The offence of criminal breach of trust is committed not only by dishonest conversion, but also by dishonest use or disposition, and there is nothing in the wording of this section to exempt from the definition of criminal breach of trust dishonest use of immovable property by the person entrusted with dominion over it.

In cases of criminal breach of trust a distinction has to be drawn between the person entrusted with property and one having control or general charge over the property. In case of the former, if it is found that the property is missing, without further proof, the person so entrusted will be liable to account for it. In the latter case, that person will be liable only when it is shown that he misappropriated it or was a party to criminal breach of trust committed in respect of that property by any other person.^{300.}

2. 'Dishonestly misappropriates'.—A temporary misappropriation may also constitute a criminal breach of trust. The bank officials in this case made public money available to a private party contrary to statutory provisions and Departmental instructions. The dishonest intention was self-evident.^{301.} Terms of section 405 are very wide. They apply to one who is in any manner entrusted with property or dominion over property. Section 405 does not require that trust should be in furtherance of any lawful object. It merely provides that a person commits criminal breach of trust if he dishonestly misappropriates or converts to his own use the property entrusted to him.^{302.}

[s 406.5] Negligence is not 'Dishonestly'.—

Criminal or dishonest intention is a *sine qua non* in an offence of criminal breach of trust. This being so the prosecution has to show that the accused dishonestly misappropriated or converted to his own use or dishonestly disposed of property entrusted to him. The prosecution must prove 'entrustment' or 'domino' over the property with the person proceeded and the person so entrusted has dishonestly misappropriated or converted that property. Even if the prosecution succeeds in proving entrustment, it would fail to establish the offence against the accused, if it fails to prove that he has misappropriated the property entrusted^{303.}

It has been held that a mere error of judgment does not attract criminal liability.^{304.}

[s 406.6] Wilful omission to account.—

Similarly, "in the case of a servant charged with misappropriating the goods of his master the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss the facts being within the servant's knowledge, it is, for him to explain the loss".³⁰⁵. In *JM Desai's* case the matter was further clarified by the Supreme Court to say, "conviction of a person for the offence of criminal breach of trust may not in all cases be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue an inference of misappropriation with dishonest intent may readily be made".³⁰⁶.

Mere retention of goods by a person without misappropriation does not constitute criminal breach of trust.³⁰⁷.

3. 'Dishonestly uses or disposes of that property'.— To constitute the offence of criminal breach of trust punishable under [section 406 of the IPC, 1860](#), there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. The misappropriation or conversion or disposal must be with a dishonest intention. Every breach of trust gives rise to a suit for damages, but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust. In the present case, apparently the prosecution has failed to establish the offence of cheating and criminal breach of trust in the absence of *mens rea*. In such view of the matter, the accused persons could not have been convicted.³⁰⁸.

3A. In violation of any direction of law.—The criminal breach of trust would, *inter alia*, mean using or disposing of the property by a person who is entrusted with or has otherwise dominion there over. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust. A direction of law need not be a law made by the Parliament or a Legislature; it may be made by an authority having the power therefor; the law could be a subordinate legislation, a notification or even a custom.³⁰⁹. It has been held that the expression "direction of law", even if taken literally, would include a direction issued by authorities in exercise of their statutory power as also power of supervision. Failure on the part of bank officials to follow RBI instructions and provisions of a Departmental Manual was a violation of a direction of law amounting to criminal breach of trust. The Manual was the UCO Bank Manual of Instructions on Bill Discounting.³¹⁰.

It has been held that the expression "direction of law" in section 405 includes banking norms, practices and directions given in internal Departmental instructions of a bank. Bank officials who allowed advance credits on banker's cheques to a customer in violation of Departmental instructions acted in violation of direction of law. The officials had dominion over the money belonging to the bank and they dishonestly used that money for conferring a benefit on the customer. They were held guilty of the offence under the section.³¹¹.

[s 406.7] Partner.—

In *Velji Raghavji*,³¹² the Supreme Court approved this statement of law in *Bhuban MohanRana v Surendra Mohan Das*, and held that mere existence of the accused's dominion over property is not enough and that it must be further shown that his dominion was the result of entrustment. According to the Supreme Court the prosecution must establish that dominion over the assets or a particular asset of the partnership was by a special agreement between the parties, entrusted to the accused partner. Where the partner of a firm had taken away some VCRs and cassettes, a criminal complaint was not allowed, the loss to the firm being essentially of civil nature and, therefore, civil proceedings would have been more appropriate.³¹³ Signing of contracts on behalf of the firm particularly when the partnership deed authorised partners to sign documents on behalf of others was held to be not constituting a criminal breach of trust.³¹⁴ As to when can a partner be prosecuted on a charge of criminal breach of trust see "Comments" *ante*.

[s 406.8] Misappropriation of company money by nominated director.—

The accused was the director of a public limited company and in that capacity he misappropriated a huge sum of money. In the complaint against him the charge was made out under section 409. However, the charge was framed under section 408. It was held that the accused was a nominated director of the company and there was nothing to indicate that he was an employee or servant of the company. Hence, his conviction under section 408 was not to be legally sound. He was convicted under section 406.³¹⁵

[s 406.9] Directors of company.—

The directors of a company were prosecuted for non-deposit of PF amount of employees. It was held that directors are not in the position of the principal employer. They could not be prosecuted as there was no entrustment of the amount to them in terms of section 405, explanation 1.³¹⁶ The offence alleged in the criminal complaint filed by respondent is under [sections 405 and 420 IPC, 1860](#) where under no specific liability is imposed on the officers of the company, if the alleged offence is by the Company. In the absence of specific details about the same, no person other than Company can be prosecuted under the alleged complaint.³¹⁷

The complainant was the wholesale dealer of the company. His dealership was terminated. Even so he sent a demand draft to the company for supply of goods. He did so because his dealership was subsequently reinstated by the company. The proprietor of the dealer firm filed a complaint alleged offence by the company because neither it supplied the goods nor returned the money. The company's application for quashing the complaint was rejected because the offence was *prima facie* made out. The Supreme Court said that only the company could be made liable but not its managing director or any other employee. The Supreme Court reversed the order of the High Court. Costs and compensation of harassment was quantified at Rs. 1,00,000.³¹⁸

[s 406.10] Husband and Wife.—

The Supreme Court has held that reading this section with [sections 4 and 6 of the Dowry Prohibition Act, 1961](#), marriage gifts and ornaments received from in-laws must be handed over to the wife on being driven out and a failure to do so, would amount to