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DECIDED ON :27.04.2015.

DURATION : 13Y.11M.03D

IN THE COURT OF THE JUDICIAL MAGISTRATE F.C.
AT KANDHAR ,DISTRICT-NANDED.

Exh.

(Presided over by D.V. Kute)

REGULAR CRIMINAL CASE NO. 124/2001.

The State of Maharashtra,
through the Police Station Officer,
Police Station Kandhar
Tq; Kandhar, Dist. Nanded.

PROSECUTATION

Versus

Murlidhar s/o Jagannath Panchal
Age 52 years, occu: service
R/o. Jalkot Tal. Jalkot Dist.Latur

ACCUSED.

C H A R G E:- Punishable under Sections 409 of the
Indian Penal Code

Mr. U.M. Wadikar,

Spl. APP for the State.

Mr. Shivraj Patil/ S.S.Lathkar, Advocate for the accused

J U D G M E N T

(Delivered on this 27th April, 2015)

Accused is facing trial for the offence punishable under sections 409 of Indian Penal Code, 1860 (hereinafter referred as IPC for short).

2. The case of the prosecution in brief is that, informant Balaji Marotrao Ratnaparkhe done the audit of Seva Sahakari Society Ltd., Marshivni, Tal.Kandhar for the period of 01-04-1998 to 30-09-1999. Till 14.08.1999 accused was group secretary of said society. First informant completed audit on 25.01.2000 and revealed that there was misappropriation of total Rs.9662/- by the accused. He gave the audit report in 13 pages. It is found that on 16.08.2009 in cash book cash at hand is shown as Rs.8760/-(Rs.Eight thousand seven hundred sixty) and that amount was with accused. So also on 17.11.1998 Rs.95/-(Rs.Ninety five) was found deficit in cash book of the society, and on 25.06.1999 cash of RS.2807/-(RS.Two thousand eight hundred seven) found less entry thereof is in cash book. On 30.06.1999 entry of RS.2000/- is made excess. From these entries it is revealed that accused has misappropriated Rs.9662/-(Rs.Nine thousand six hundred sixty two). Thus, in all accused misappropriated Rs.8760/-(Rs.Eight thousand seven hundred sixty). After his audit report, he informed the accused to deposit the said amount. On 25.01.2000 accused gave letter admitting the amount with him.

Informant submitted special report dated 13.03.2000 to the Special Auditor class I of the Co-operative society, Nanded for further action. Thereon the authority gave letter dated 30.11.2000 to the informant to lodge the prosecution and accordingly on 09.01.2001 first informant lodged the first information in police station, Kandhar against the accused. On the basis of said information, police station officer, Kandhar has registered the crime No.08/2001. Investigation was handed over to PSI A.B. Patil. He seized the record in presence of two panchas, recorded the statements of the witnesses and filed report under section 173 of the Code of Criminal Procedure (hereinafter referred as Cr.P.C for short).

3. The learned Predecessor of this court has framed charge against the accused for the offence punishable under section 409 of the I.P.C vide Exh.8. It was read over and explained to the accused in vernacular to which he pleaded not guilty and claimed to be tried.

4. In order to prove the guilt of the accused, prosecution has examined Balaji Marotrao Ratnaparkhe as P.W.1 vide Exh.16, PW-2 Afzal Balasaheb Lakhire (Exh.51), PW-3 Vishwambhar Pandurang Honrao (Exh.54), PW-4 Pundlik Tukaram Jadhav (Exh.56), PW-5 Manohar Tukaram Honrao (Exh.57) and PW-6 Nagorao Govindrao Ladekar (Exh.60). Prosecution has relied on the following documents.

- i) Audit report at Exh.17.
- ii) Notice issued to the accused by informant at Exh.41.
- iii) Letter of accused dated 25.01.2000 (Exh.42),
- iv) Special report of informant dated 13.03.2000 (Exh.43),
- v) Letter of special auditor class I of the Co-operative Society, Nanded dated 13.11.2000 (Exh.44).
- vi) First information report dated 09.01.2001 (Exh.45)
- vii) Spot panchanama (Exh.55), seizure panchnama (Exh.53)
- viii) Affidavit dated 25.01.2000 (Exh.61),
- ix) Receipt book at Exh.19,
- x) Cash book at Exh.18 and Kird Exh.52.

5. After the completion of evidence of prosecution accused has been examined under section 313 of the Cr.P.C. He has not entered into defence, however, from the cross examination of the prosecution witnesses and his answers in examination under section 313 of the Cr.P.C, it appears that his defence is false implication due to misunderstanding.

6. Heard learned A.P.P for the prosecution & learned advocate appearing for the accused. Following points arose for the determination, findings thereon are recorded with reasons stated thereunder.

POINTS

FINDINGS

01) Whether the prosecution has proved that accused being public servant committed criminal breach of trust in respect of property entrusted to him and thereby committed an offence punishable under section 409 of the I.P.C.? Not proved.

2) What order?

As per final order

REASONS

As to Points Nos.1 :-

7. Learned A.P.P has relied on the oral and documentary evidence led by the prosecution, specially the letter of accused at Exh.42 and submitted that the accused was public servant at the relevant time and he misappropriated the government money. On the other hand, learned advocate for accused has relied on the cross examination of PW-1 Balaji Marotrao Ratnaparkhe and submitted that accused is not the public servant within the meaning of section 21 of the I.P.C, therefore, accused can not be held guilty for the offences punishable under section 409 of the I.P.C. In support of his submission he has relied on the case of State of Maharashtra Vs. Lalji Rajshe Shaha and others reported in AIR 2000 SC 937.

8. Admittedly, the accused was group secretary of Seva

Sahakari Society, Marshivni Tal.Kandhar. First informant auditor Balaji in his cross examination admitted that accused is not public servant and alleged misappropriated amount is not of the Government.

9. In the case of State of Maharashtra (supra) the Hon'ble Supreme Court in para No.6 of the report has held that :-

A “Public servant” within the meaning of Section 2 of the Maharashtra Co-operative Societies Act,1960, is not a “public Servant” within the meaning of Section 2 of the Prevention of Corruption Act 1947 (II of 1947) by virtue of the provisions of Section 161 of the Maharashtra Co-operative Societies Act, 1960, read with Section 21 of the Indian Penal Code. It is undoubtedly true that the Co-operative Societies Act has been enacted by the State Legislature and their powers to make such legislation is derived from Entry 32 of List II of the Seventh Schedule to the Constitution. The legislature no doubt in Section 161 of Mah.Act has referred to the provisions of Section 21 of the Indian Penal Code but such reference would not make the Registrars and other officers under Co-operative Societies Act 'public servants' within the ambit of Section 21

of I.P.C. The State Legislature had the powers to amend Section 21 of the Indian Penal Code, the same being referable to a legislation under entry I to III of the Seventh Schedule, subject to Article 254(2) of the Constitution as, otherwise, inclusion of the persons who are public servants under Section 161 of the Co-operative Societies Act would be repugnant to the definition of public servant under Section 21 of the Indian Penal Code. That not having been done, by virtue of deeming definition in Section 161 of the Co-operative Societies Act by reference to Section 21 of the Indian Penal Code, the persons defined as 'officers' under Maharashtra Co-operative Societies Act cannot be prosecuted for the offences under the Indian Penal Code.

10. Thus, in view of principle laid down by the Hon'ble Supreme Court in the ruling (supra) the accused can not be held to be the public servant within the meaning of section 21 of the I.P.C and therefore he can not be held guilty under section 409 of the I.P.C, which deals with the criminal breach of trust by public servant.

11. Now it is to be seen whether the alleged criminal breach of trust is proved by the prosecution. Section 406 of the I.P.C

provides punishment for simple criminal breach of trust whereas section 408 of the I.P.C provides punishment for the person who is clerk, servant and committed the misappropriation of the property entrusted to him or having any dominion over the property. Section 405 of the I.P.C provides the definition of criminal breach of trust. For attracting the offence of criminal breach of trust, following ingredients have to be satisfied.

- i) Entrusting any person with the property or with any dominion over the property.
- ii) The person entrusted a) dishonestly misappropriating or converting to his own use that property or b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation of any direction of law prescribing the mode in which such trust is to be discharged or any legal contract made touching the discharge of such trust.

12. It is now well settled law that dishonest intention is the gist of the offence of criminal breach of trust. Criminal or dishonest intention is sine quo non for the offence of criminal breach of trust. Therefore, the prosecution has to show that the accused dishonestly misappropriated or converted to his own use or dishonestly disposed of property entrusted to him. Therefore, only because money is retained offence defined under section 405 of the I.P.C can not be held to be proved. Two things are essential to constitute the offence of criminal

breach of trust, in the first place there must be trust, and in the second place dishonest intention. The burden is on the prosecution to prove these two things. Now in the light of these principles the evidence on record to be assessed.

13. Learned A.P.P for the state has relied on the documentary evidence on record and submitted that the accused has admitted that he has kept the amount with him vide letter at Exh.42. He submits that the receipt book at Exh.19, cash book at Exh.18 and Kird at Exh.52 shows that the accused has misappropriated the money of society and therefore, he has committed the offence of criminal breach of trust. On the other hand, learned advocate for accused has submitted that the first informant in his cross examination admitted that if the receipts at Exh.47 & 48 were shown to him this prosecution might have not been launched. He further submitted that according to the prosecution case, accused has not given receipts of the amount to four persons viz Manohar Tukaram, Tukaram Datta, Subhash Jalba and Govind Gyanoba. He submits that except Manohar Tukaram other persons are not examined by the prosecution and Manohar Tukaram has not supported the prosecution. He further submits that the secretary of the society (PW-6) has admitted that the accused has not used the amount for his own purpose. Hence according to him, the offence of criminal breach of trust is not proved.

14. It is not disputed that the accused was group secretary of the Seva Society and he was entrusted with the property allegedly to be misappropriated. It is also not disputed that accused later on deposited the said amount in the bank. Therefore, it is only to be seen whether accused was having in dishonest intention to retain the said property (money)?

15. PW-1 Balaji Ratnaparkhe is the auditor and first informant. In his cross examination Exh.47 & 48 i.e receipts whereby accused deposited the amount in the bank were shown to him. He admitted that the Exh.47 & 48 i.e receipts were not shown to him by the society before giving of special report. It appears from the receipt at Exh.48 that on 28.02.2000 accused has deposited Rs.7000/- in the bank in the account of Seva Society, whereas, vide receipt at Exh.47 dated 19-01-2001 accused has deposited Rs.2000/- in the bank. The special report is dated 13.03.2000 i.e after depositing of Rs.7000/- by the accused in the bank. So also, first information report has filed on 09.01.2001 i.e after depositing of Rs.7000/- by the accused in the bank and prior to deposit of Rs.2000/- by him in the bank.

16. PW-2 Afzal was the secretary of the society in the year 2001 when audit was done. He deposed that seizure panchnama Exh.53 was prepared in his presence, whereby accused has produced kird, receipt book and register at Exh.52.

In his cross examination, he admitted that the seizure panchnama was kept written prior to his reaching to the police station & he has no knowledge what was written in the panchnama. Prosecution has not examined another seizure panch witness or investigation officer. Thus, the preparation of seizure panchnama Exh.52 is doubtful.

17. According to prosecution, PW-3 Vishwambhar Honrao is spot panch witness, however, he has not supported the prosecution. In his cross examination, he deposed that he did not know the contents of panchnama and it was written prior to his reaching to the spot. Prosecution has not examined another spot panch witness or investigation officer. Therefore, preparation of spot panchnama is also doubtful. PW-4 Pundlik Tukaram Jadhav was the chairman of the society at the relevant time. He has also not supported the prosecution. Learned A.P.P asked the questions in the nature of cross examination to him, however, nothing material has transpired against the accused. In the cross examination, conducted on behalf of the accused he admitted that no member of society made complaint to him that he has not received the receipt from the accused though he paid the loan amount. According to the prosecution PW-5 Manohar Tukaram Honrao is the member of society to who paid loan amount to the accused, however, accused has not given the receipt thereof to him. However, this witness also not supported the prosecution. In his cross examination, on behalf of accused

he admitted that he is the member of society from last 18 years. He further admitted that if there is loan amount standing in the name of member, no further loan amount can be sanctioned to him. He admitted that he paid the loan amount therefore he used to get the loan per year and accused used to gave receipt of loan deposited by him. The other three persons to whom accused has not given the receipts are not examined by the prosecution. Document to that aspect in the nature of affidavit is filed at Exh.61. However, three persons named in Exh.61 are not examined by the prosecution and PW-5 Manohar Tukaram Honrao has not supported the prosecution.

18. PW-6 is the present secretary of the society. In his cross examination, he admitted that accused has not used the amount retained for his own purpose. In such circumstances, as stated earlier dishonest intention of the accused can not be held to be proved. Thus, aforesaid evidence shows that there is lack of dishonest intention on the part of accused. The prosecution has not proved that the accused retained the amount entrusted to him with dishonest intention and converted it to his own use. It is well settled law that the negligence can not be termed as dishonest intention. On this aspect, learned advocate for accused has relied on the case of Jagroop singh Vs. State of Punjab reported in 1980 Cri.L.J 68, wherein the Sarpanch of the village kept the exceeding amount with him without depositing the same as required by Sub divisional, Magistrate. However, there

was no evidence to show that he had the slightest dishonest intention to misappropriate amount or had caused any wrongful loss to the panchayat or wrongful gain to the himself by keeping money in his possession. The Hon'ble Punjab and Haryana High Court has held that the elements of misappropriation were not satisfied in the case, even if accused was somewhat negligence in not keeping proper accounts or committed irregularity by keeping the money with him, especially when not a single villager had complained against him. In the present case also none of the member of the society made the complaint that the accused has not given receipt to them or misappropriated the money of society, even the chairman of the society, the secretary of the society have also not stated that the accused dishonestly used the money of society for his own purpose. In such circumstances, even if the accused is negligent or made irregularity by not depositing the amount forthwith in the bank, he has not used the same with dishonest intention. Hence, the essential element of the offence of criminal breach of trust i.e dishonest intention is not proved. Hence accused can not held guilty of the offence defined under section 405 of the I.P.C. Accordingly, point No.1 is answered as not proved against accused.

As to Points Nos.2 :-

19. In view of findings on point No.1 & 2, accused is entitled for the order of acquittal. Muddemal registers, cash book,

receipt book have to be handed over to the Seva Society Marshivni after appeal period is over. Hence order.

ORDER

1. Accused is acquitted from the offence punishable under sections 409 of the I.P.C vide section 248(1) of the Cr.P.C.
2. His bail bond stands cancelled.
3. He is set at liberty.
4. Muddemal registers (Exh.18,52) & cash/receipt book (Exh.19) be handed over to the authorized person of Seva Sahakari Society, Marshivni Tal.Kandhar Dist.Nanded after appeal period is over.
5. Accused is directed to execute P.B.&S.B of Rs.7500/- (Rs. Seven thousand five hundred) vide section 437-A of the Cr.P.C to appear before the Higher Court as and when such Court issues notice in respect of any appeal or petition filed against this judgment. Such bail bonds shall remain in force for six months from today.

6. Dictated and pronounced in open court.

Date: 27.04.2015.

(D.V. Kute)
Judicial Magistrate F.C.,
Kandhar.

Transcript signed on 28.04.2015

(D.V. Kute)
Judicial Magistrate F.C.,
Kandhar.

CERTIFICATE

I affirm that the contents of this P. D.F file judgment are same word to word, as per the original Judgment.

Name of the Stenographer	:- Telang P. S
Court Name	:- In the Court of Jt. Civil Judge, J.D & Judicial Magistrate F.C, Kandhar
Date	:-27.04.2015.
Judgment signed by the presiding officer on	:- 28.04.2015
Judgment uploaded on	:- 29.04.2015.

OPERATIVE ORDER

1. Accused is acquitted from the offence punishable under sections 409 of the I.P.C vide section 248(1) of

the Cr.P.C.

2. His bail bond stands cancelled

3. He is set at liberty.

4. Muddemal registers (Exh.18,52) & cash/receipt book (Exh.19) be handed over to the authorized person of Seva Sahakari Society, Marshivni Tal.Kandhar Dist.Nanded after appeal period is over.

5. Accused is directed to execute P.B.&S.B of Rs.7500/- (Rs. Seven thousand five hundred) vide section 437-A of the Cr.P.C to appear before the Higher Court as and when such Court issues notice in respect of any appeal or petition filed against this judgment. Such bail bonds shall remain in force for six months from today.

5. Dictated and pronounced in open court.

Date: 27.04.2015.

(D.V. Kute)

Judicial Magistrate F.C.,Kandhar.

