MukimuddIn Vs. the State

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Court : Delhi

Decided On : Apr-05-1991

Reported in : 1991CriLJ2903

Judge : Arun B. Saharya, J.

Appeal No. : Criminal Revn. No. 194 of 1990

Appellant : Mukimuddin

Respondent : The State

Advocate for Def. : B.D. Batra, Adv.

Advocate for Pet/Ap. : Ms. Anjana Gosain, (amices Curiae

Judgement :
ORDER

1. This revision petition has arisen out of a common judgment dated 14th of August, 1989 of Shri J. P. Singh, Addl. Sessions Judge, Delhi, disposing of five appeals, upholding a composite judgment and order dated 5th of June, 1989 of the Metropolitan Magistrate, Delhi in five cases convicting the petitioner u/S. 408, IPC but reducing the sentence from three years to two years rigorous imprisonment and maintaining the fine of Rs. 5,000/- to run concurrently in each case in respect of the years 1973 to 1977.

2. The petitioner was, at the relevant time, an employee of M/s. Ahmed and Co. (hereinafter referred to as the firm) which carried on poultry business at Juma Masjid, Delhi. He resigned from service and settled his account with the firm on 12th of October, 1977. Six years later, an FIR dated 30th of March, 1983 Ex. PW 4/G was registered at Police Station Juma Masjid, on the basis of information given in writing Ex. PW-3/A dated 12th of June, 1982 by the Manager of the firm, alleging that the petitioner was working as a clerk-cum-cashier, and in that capacity he used to handle cash and maintain the account books of the firm; that during the period 1973 to 1977 he committed breach of trust and embezzled a sum of Rs. 1,72,316.37; and that this came to light when the account books were checked by the Income-tax Department.

3. Four challans were registered against the petitioner in respect of each financial year but the same were tried together. The charge was framed in the following terms :-

'That you on or about the year between 1973 to 77 employed as a clerk/servant by Ahmed and Co. at 4100 Katra Nizamul Mulk Jama Masjid Delhi and being in such capacity entrusted with or you were in dominion over the maintenance of cash and account and you committed criminal breach of trust of amount 1,72,316.37 with respect to the said cash and account and thereby committed an offence punishable u/S. 408, IPC ....'

4. The prosecution examined five witnesses, namely, P.W. 1 Mujib Ali who also was working as a Clerk in the firm, P.W. 2 Rafiuddin who was employed as a clerk in Iqbal and Co. (described by some of the witnesses as a sister concern of the firm), P.W. 3 Anis Ahmed, Manager of the frim, P.W. 4. Sub-Inspector Bashir Ahmed, the Investigating officer and P.W. 5 T. R. Mehra, the handwriting expert produced to prove disputed signatures of the petitioner on two documents Ex. PD and Ex. PE.

5. The trial Court convicted the petitioner primarily on the testimony of P.W. 1 which was based upon the contents of certain registers/accounts books of the firm marked Ex. P-1 to Ex. P-12.

6. In appeal, the Addl. Sessions Judge resorted to a short-cut. Instead of going into the account books and the oral evidence on record to test the various pleas that were urged before him, he brushed aside everything else and proceeded on the basis of Ex. PW-3/12, treating it as an 'unchallenged' document showing the break up of the embezzled amount; and on another set of documents comprising Ex. PW-1/D6 a notice dated 8th of April 1982 served on the accused demanding payment of the full amount of Rs. 1,72,316.37, and Ex. PD and Ex. PE, both dated 22nd of February 1981 described by PW-1 as an agreement and a receipt respectively to show acknowledgment of the liability and part-payment of a sum of Rs. 25,000/- by the accused. Ex. PD and Ex. PE were found to be proved by the 'unimpeachable' testimony and report of the handwriting expert. Thus, conviction of the petitioner was maintained but the sentence was reduced on the ground that he had paid a part of the amount back to the employer and had also expressed his willingness to repay the balance amount in Installments.

7. Ms. Anjana Gosain, Advocate who has very ably assisted the Court in this case as amices curiae challenged the conviction and sentence of the petitioner, inter alia, on the grounds that there was a long delay in the registration of the case against the petitioner; that Ex. PD and Ex. PE were inadmissible in evidence as the specimen signatures of the accused used as base by the handwriting expert were taken during investigation when the accused was in custody; that the books of account marked Ex. P-1 to Ex. P-12 and the statements of account Ex. PW-3/1 to Ex. PW-3/12 were not duly proved; that there were material contradictions and lacunae in the testimony of the prosecution witnesses; and that there is no cogent evidence on record to justify conviction of the petitioner under S. 408, IPC.

8. To test correctness of finding of the Lower Courts, it is necessary to refer to the account books/registers Ex. P-1 to Ex. P-12. But, on enquiry from the Lower Courts, it has been discovered that the said registers were destroyed on 4th of September, 1989 after appeals bearing Nos. 31 to 35 were decided by the Sessions Court on 14th of August, 1989. Mr. Batra, learned Standing Counsel for the State has confirmed that those registers were made over to the police for safe custody during the trial and that the same had been destroyed after decision of the appeals. It is, thereforee, unnecessary for me to deal with the various propositions

developed and advanced by Ms. Gosain.

9. P.W. 1 Mujib Ali deposed, inter alia, that the petitioner was working as clerk-cum-cashier in the firm, that it was his duty to maintain the books of account and 'to receive the cash and deposit the same in the said firm'; that after the accused resigned from service, 'the owners came to know about some bungling in the income-tax papers and then the ledgers relating to the accused was got checked. There the difference in the entry recorded by the accused was noted. Those entries were pertaining for the years 1973 up to year 77 ....'

10. With reference to the account books of the firm, he pointed out that during the relevant period, totalling of various entries recorded therein was wrong. For example, in respect of 10th, 11th and 19th of December, 1973, he said : 'As per the entries made by the accused in the cash register there was a difference of 97/- in totalling on 10-12-73 and Rs. 10.32/- on 11-12-1973, difference of 110/- in totalling on 19-12-73'. Likewise, he mentioned the figures for 24th, 27th, 28th, 29th and 31st of December, 1973. With regard to here entries, he stated : 'The accused used to take the entrusted money after making wrong calculation in the totalling and used to mention the wrong total at the end of the total of the day'. Then, after referring to the entries made on different dates in the month of January and February 1974, he stated : 'In the year 1973 and 1974 the accused had misappropriated Rs. 2931.97/- by making a wrong calculation in the cash book and taking away the amount by mentioning the wrong balance; I have seen the cash register of year 1973-74 and same is Ex. P-1 in which the accused had made the wrong entries'.

11. Similarly, he deposed with regard to the entries pertaining to the period from 1-4-74 to 25-1-75. For example, with reference to the entry dated 2nd of December, 1974, he said : 'As per register Ex. P-2 the accused had made the entries dt. 2-12-1974 where he had shown Rs. 200/- less on the totalling at the time of totalling during the close of the rokar and said Rs. 200/- were not deposited as per the cash register by the accused in the firm office'.

12. For the period after January, 1975. however, P.W. 1 did not indicate the day by day or month by month figures. But, he generally touched upon the subsequent

period and stated : 'I have seen the ledger today in the court and all entries in the ledger Ex. P-1 to Ex. P-11 were made by the accused, present in the court and these are called Rokar register. The accused had made entries from 1973 to 1977-78 and I identify the entries made in the records from Ex. P-1 to Ex. P-12 during this period'.

13. The sum and substance of the statement of P.W. 1 shows that he deposed, in the first part, in respect of the year 1973-74 and, in the second, about the period from 1st of April, 1974 to 25th of January, 1975, on the basis of the registers Ex. P-1 and Ex. P-2 respectively. Regarding the remaining period, i.e. for the years 1975-76, 1976-77 and 1977-78, he made a general statement without indicating the dates or the amounts of difference in the count up of the entries in the relevant registers for each year. From his statement, it is not possible to discern whether the entries in respect of the last three years were recorded in three of the registers, and, if so, what was written in the other registers. He did not say a single word about the registers Ex. P-3 to Ex. P-12.

14. Apart from this, P.W. 1 briefly touched upon Ex. PD and Ex. PE also. He referred Ex. PD as 'one deed of compromise'. He stated in his cross-examination : 'Ex. PD is written by me. Ex. PD is the agreement between me and the accused. It also bears my sig. along with the sig. of the accused. I was authorised by the owners of Ahmad and Co. to execute an agreement with the accused on their behalf. Authority was oral'. He described Ex. PE as 'the receipt executed by the accused'.

15. P.W. 3 Anis Ahmed deposed that he was the Manager of the firm. The accused used to maintain the account books and he used to receive cash on behalf of the firm. He fabricated accounts and embezzeled a sum of Rs. 1,72,317/- approximately. When the books were got checked for income-tax assessment etc., the embezzlement was detected and the report Ex. PW-3/A was made to the police station Jama Masjid. One attendance register and 12 account books/registers were handed over by him to the police. He testified : 'The attendance register is Ex. PA and cash registers are Ex. P-1 to Ex. P-12. These are the same which were seized by the police. The photo copy extract of each

register containing their last entries are Ex. PW-3/1 to Ex. PW 3/12 (original seen)'.

16. P.W. 4 Sub-Inspector Bashir Ahmed was the Investigating Officer. With regard to the documentary evidence, he stated : 'On 4-5-83 I went in the office of the Ahmed and Co. situated at Katra Nijamulkj JM Delhi. There Anis Ahmed met me. He produced the various registers before me. I seized register Ex. P-1 pertaining to the year 1973-74. Rokar registers Ex. P-2 to Ex. P-12 were seized by me vide memo Ex. PW 1/A. The extract of the entries on the various registers were got photographs. The extract of those entries are Ex. PW-3/1 to Ex. PW 3/12'.

17. Now, let us take up the documentary evidence that was relied upon by the Sessions Court. With regard to Ex. PW-3/12, what is said in paragraph 8 of the impugned judgment is this :

'Ex. PW-3/12 is the document which shows the break up of embezzlement amount right from the year 1973-74 to 1977-78 and the total comes to Rs. 1,72,316.37. This document remains unchallenged'.

There is no discussion on Ex. P-1 to Ex. P-12 or on Ex. PW 3/1 to Ex. PW-3/11 anywhere in the judgment. It is clear that the Appellate Court has placed reliance solely upon Ex. PW-3/12. I have carefully examined this document. It bears no semblance of an extract taken from any account book. It purports to be a memorandum prepared by some one to note down against each year 1973-74, 1974-75, 1975-76, 1976-77 and 1977-78, the figures 2931.37, 17849.70, 64317.75, 79764.75, and 7452.20 respectively, aggregating to 1,72,316.37. On the face of it, this document does not even indicate whether the figures mentioned therein denote weight or measurement of anything or the amount of money with reference to each year. This piece of paper by itself makes no sense.

18. In order to understand the nature and contents of Ex. PW-3/12, scrutiny of the record was undertaken. Ex. PW-3/12 is really a summary of various statements marked Ex. PW-3/1 to Ex. PW-3/11. In turn, study of those statements reveals that each of them also is a compilation of figures which denote the allegedly embezzled amount in respect of different parts of the relevant period. It is necessary, however, to dilate and describe to some extent the text of these

documents.

19. Ex. PW-3/1 purports to be a statement in respect of the year 1973-74. Various dates, starting from 10th of December, 1973 to 18th of February, 1974, and figures are noted therein. For example, against the date 10th of December, 1973 is jotted the figure 97.00. Against 11th of December, 1973, it is 10.32 and against 27th of December, 1973, the figure 200.00 is noted down. The figures in relation to 2nd, 9th and 10th of January are 200.00, 100.00 and 10.00 respectively. Likewise, in February, facing the 13th is noted the figure 1.00. The figure 100.00 is noted against 14th as also 16th of February, while 103.00 is mentioned against 18th of February. For each month the figures are added up and the total is indicated. For the month of December, 1973, January and February, 1974, it is 2017.97, 610.00 and 304.00 respectively. Thereafter, these three figures are added up showing an aggregate of 2931.97. This is the figure mentioned by P.W. 1 as the amount of difference caused by wrong totalling of the entries for the year 1973-74 made in Ex. P-1. This is the first item in Ex. PW-3/12.

20. For the year 1974-75 the statement is spread over three different sheets : Ex. PW-3/2 for the period from April to July, 1974; Ex. PW-3/3 from August to November, 1974; Ex. PW-3/4 for December, 1974 and January to March, 1975; Ex. PW-3/4 also shows the monthwise figures and the total of 17849.70 for the whole year which is reflected as the second item in Ex. PW-3/12.

21. Likewise, Ex. PW-3/5, Ex. PW-3/6 and Ex. PW-3/7 cover the period 1975-76. The figures noted therein add-up to 64317.75. This is the third item in Ex. PW-3/12. Then, the period 1976-77 is covered by Ex. PW-3/8 to Ex. PW-3/11, the total of which comes to 79764.75 which is projected as the fourth item in Ex. PW-3/12. However, there appears to be nothing on record to back up the figure of 7452.20 for the year 1977-78 depicted as the last item in Ex. PW-3/12.

22. On this analysis it appears that P.W. 3 and P.W. 4 had misrepresented the nature and character of Ex. PW-3/1 to Ex. PW-3/12 and that the same are not the extracts of the entries that may have been recorded in the original registers Ex. P-1 to Ex. P-12. These notes, it appears, were prepared later by some one to tabulate the alleged difference found out on a fresh tally of the entries made from

time to time in the original account books Ex. P-1 to Ex. P-12. But, who did it, and when, is not borne out from the record. In this view of the matter, without the original account books/registers Ex. P-1 to Ex. P-12, no reliance can be placed upon Ex. PW-3/1 to Ex. PW-3/11, or upon Ex. PW-3/12.

23. In these circumstances, due to non-availability of the original books of account Ex. P-1 to Ex. P-12, it is not possible to test correctness of the statement of P.W. 1. At one place, he said that the petitioner deposited amounts short of what was actually collected by him. At another place he said that the day-to-day totalling of the entries made in those books was wrong. It is also not possible to ascertain whether the entries made in the account books show arithmetical mistakes innocently made by the petitioner, or the same bear out a pattern strong enough to constitute the offence punishable u/S. 408, IPC. As earlier discussed, Ex. PW-3/1 to Ex. PW-3/12 also are of no help without the original account books on the basis of which the same may have been tabulated. As such, it is not possible to test the correctness of the findings of the two courts below on which is based the conviction and sentence of the petitioner u/S. 408, IPC.

24. In Mohd. Ibrahim v. State, : AIR1969 Delhi315 , I. D. Dua, C.J. observed (para 6) :

'............... The Appellate Court and the revisional Court is entitled, while scrutinising the case against the accused, to have complete material before it on which the prosecution relies for proving the case against the accused persons. In the present case, to deprive this Court of the benefit of looking at the dies, is a serious infirmity which must be held to be fatal to the prosecution case ....'

25. In Lala Ram v. State : 36(1988)DLT8 in view of the provisions contained in Ss. 451 and 452 of the Code of Criminal Procedure as well as the provision made in Vol. III Chapter 2-E of High Court Rules and Orders, a Division Bench of this Court reiterated the position as follows (at p. 580 of Cri LJ) :-

'In view of the mandatory provisions contained in the Code of Criminal Procedure as well as in the High Court Rules and Orders, the prosecution was duty bound to keep in safe custody the case property so that the appellate and the revisional court had the opportunity to examine and scrutinise the material before it on which the prosecution relied for proving their case against the accused persons. In the present case, to deprive the High Court of the benefit of examining the weapons of offence, and other articles taken into possession was a serious infirmity which must be held to be fatal to the prosecution case.'

26. In the instant case, the above-noted principles apply with greater force inasmuch as the charge against the accused could stand, if at all, only on the original account books Ex. P-1 to Ex. P-12. Indeed, the testimony of P.W. 1 as also that of P.W. 3 rests upon the contents of those books. Ex. PW-3/1 to Ex. PW-3/12 also seem to have been prepared on the basis of those books. Independently, the same cannot carry conviction.

27. The case of the prosecution cannot stand even on the basis of the other set of documents relied upon by the Appellate Court, namely, Ex. PW-1/D6, Ex. PD and Ex. PE. The demand by notice Ex. PW-1/D6 for payment of the sum of Rs. 1,72,316.37 was made on the basis of the accounts contained in the original books Ex. P-1 to Ex. P-12. Ex. PD, according to P.W. 1, was a compromise deed signed by the petitioner to settle his liability to repay the allegedly embezzeled amount and Ex. PE was the receipt showing part payment of Rs. 25,000/- by the petitioner. It is interesting to note that both these documents are dated 22nd of February, 1981. Despite part-payment of Rs. 25,000/-, a demand was subsequently made by Ex. P.W. 1/D6 dated 8th of April, 1982 for the whole amount of Rs. 1,72,316.37. P.W. 1 and P.W. 3 were cross-examined on this aspect, but neither of them could satisfactorily explain why the earlier part-payment was not taken into account while giving the notice through an Advocate. The case of the prosecution cannot be sustained merely on these suspicious documents.

28. In any event, Ex. PD and Ex. PE were written in the hand of P.W. 1 Mujib Ali. The petitioner, according to the prosecution story, appended his signatures on them. The signatures are disputed. The specimen signatures of the petitioner, with which the signatures on Ex. PD and Ex. PE were compared by P.W. 5, were taken by the police during investigation when he was in custody. The same are not

admissible in evidence. The conviction of the petitioner, thereforee, cannot be pegged on any one, or on the set, of these documents.

29. As a result, the impugned judgment as also the conviction and sentence of the petitioner u/S. 408, IPC are set aside. The petitioner is acquitted in all the five cases, and the bond furnished by him is discharged. The revision petition is, accordingly, allowed. No costs.

30. Revision allowed.