

Nelson Loo Vs. M.L. Gupta and anr.

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Court : Kolkata

Decided On : Jul-11-1960

Reported in : AIR1962Cal197

Judge : Debabrata Mookerjee and ;D.N. Das Gupta, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 405 and 409

Appeal No. : Criminal Appeal No. 514 of 1958

Appellant : Nelson Loo

Respondent : M.L. Gupta and anr.

Advocate for Def. : Jogesh Chandra Sinha, Adv.

Advocate for Pet/Ap. : Ajit Kumar Dutta and ;Bimal Chandra Chatterjee, Adv.;Bejoy Bhose, Adv. for Indian Airlines Corporation

Disposition : Appeal allowed

Judgement :

Debabrata Mookerjee, J.

1. The appellant Nelson Loo has been convicted by a Presidency Magistrate on three counts of charge under Section 409 of the Indian Penal Code and sentenced to varying terms of imprisonment and fines on the three counts.

2. The appellant was at the material time carrying on the business of a travel agent. Overseas Air Travels was a Travel Agency concern of which he was the proprietor. He had been in the trade ever since 1949. Overseas Air Travel was an approved Sales Agent for all international Airlines operating through India and it came to be appointed as the travel agent on behalf of Indian Airlines Corporation under an agreement dated the 1st of December, 1954. The agency office was located at P. 29 Mission Row Extension, Calcutta. The appellant himself lived with his wife and children in a suite of rooms at 21, Mission Bow Extension.

3. The Air Corporations Act was passed by Parliament in 1953. It was an Act to provide for establishment of Air Corporations, for acquisition by them of all undertakings belonging to existing Air Companies and for operation of air transport services. Under the Act two Corporations were established; they were the Indian Airlines Corporation and the Air India International. The Indian Airlines Corporation has its head office at New Delhi and the Calcutta branch is located at P. 17, Mission Row Extension.

4. As we have said, by an agreement dated the 1st of December, 1954 the Overseas Air Travels came to be appointed a Selling Agent to promote and propagate passenger traffic and carriage of cargoes on the services of the Indian Airlines Corporation. As Selling Agent the appellant was entitled to varying rates of commission on prices of transportation sold and freight of cargoes booked. The procedure was that Overseas Air Travels would issue exchange vouchers to intending passengers and on production of those vouchers at the counter of the Airlines Corporation, tickets would be issued enabling passengers to perform their Journey. The vouchers received at the Corporation's Office would be collected, sent to the head-office at New Delhi where bills would be prepared and then remitted to the Calcutta Office for presentation to Overseas Air Travels for payment of the bills. The appellant realised the prices of transportation sold and freight of cargoes booked on the Corporation's service from the customers and thereafter when the Corporation submitted their bills supported by copies of exchange vouchers issued by the appellant, the latter would be required to meet the bills and make the payments.

5. The relevant provisions in the agreement appointing the appellant as a selling agent on behalf of the Corporation were as follows :

'(a) All transportations sold by the Sales Agent in accordance with the provisions of this Agreement shall be sold subject to the conditions of carriage of the Corporation applicable to such transportation and the tariffs, rules, regulations and instructions governing the sale and use of such transportation in force from time to time.

(b) No sale of transportation shall be regarded as having been arranged unless and until the transportation applied for has been covered by an exchange voucher-order of the Sales Agent and has been accounted for as hereinafter stated.

(c) No transportation shall be sold or freight and/or baggage accepted for transportation directly or indirectly at a rate other than that fixed by the Corporation.

(d) The Sales Agent shall account to the Corporation for the price of all transportation sold by him as soon as possible after the finish of each month or upon presentation of the Corporation's bill. In the event of his failure to do so, the Corporation may stop his credit facilities forthwith without previous notice."

6. The last clause which we have just read recites the appellant's accountability to the Corporation for prices of transportation sold by him. He was required to pay the prices after the close of each month or on presentation of the Corporation's bill; and by his failure to do so he might incur stoppage of credit facilities in future.

7. On the case made the practice of periodical presentation of Corporation's bill for the purpose of obtaining payment was established by the evidence, and no question appears to have been raised of the appellant's failure to account for prices of transportation received at the close of the month. There were thus periodical bills which were paid periodically by the appellant until things took a different turn and the appellant came to be prosecuted.

8. The case for the prosecution briefly stated was that large sums of money being prices of transportation sold by the appellant became due and three cheques

(Exhibits 11, 13 and 17) of the total value of Rs. 25587/11 issued by the appellant in January, 1956 were not paid. They were dishonoured and returned by the Bank with a note 'referred to drawer'. This put the Corporation on enquiry and it was found that the appellant had left the country for an unknown destination. Accordingly on the 14th of February a complaint was filed charging him with having committed criminal breach of trust in respect of certain sums of money which represented the prices of transportation sold by him. His books and papers were seized under a search warrant and it was found, that he had before leaving this country withdrawn about Rs. 70,000/- from his banks. He was at last traced to Hongkong where on the strength of an extradition warrant he was arrested and brought back to Calcutta to face the trial.

9. The case eventually made was that although the appellant had actually realised several sums of money as prices of transportation from passengers he did not credit the amount to the Corporation and misappropriated the same or disposed of them in violation of the contract which he had made with the Corporation. The total of the sums misappropriated was Rs. 1912/5.

10. The appellant was thus charged on three counts under Section 409 of the Indian Penal Code; First, with having dishonestly disposed of or used a sum of Rs. 397/1 being the sale proceeds of an air ticket sold to one Lindren on the 24th November, 1955, secondly with having dishonestly disposed of the sum of Rs. 584-4 representing the price of air tickets sold on the 1st November, 1955 to three persons--D.G. Nicholas and F.N. Thomas (Mr. and Mrs.); and thirdly with having dishonestly disposed of a total sum of Rs. 931/- representing the prices of air tickets sold on the 19th October, 1955 to C. Coelho, J.S. Bir, D.M. Sen, V. Ragleton and V.J. Howley. In each of these three counts of charge it was recited that the appellant had been entrusted with dominion over the Corporation's property, namely, the prices of transportation and that he committed criminal breach of trust by disposing of the amounts in violation of the selling agent's agreement referred to above.

11. To the charges framed the appellant pleaded not guilty. His defence was that neither according to the terms of agreement nor in actual practice which governed

his relations with the Corporation, could he be called an agent except for the limited purpose that he sold the tickets to passengers for and On behalf of the Corporation; the realisation of prices of transportation was entirely his concern with which the Corporation had nothing to do; when the prices of transportation were realised, they were put into his own accounts in the bank; and later when the bills were submitted by the Corporation on the basis of the exchange vouchers issued by him, he would pay the bills and discharge his liability which was merely a debt to the Corporation, He stated that prices of transportation remained unrealised in some cases and yet he went on making periodical payments against the bills. He was even reduced to the necessity of taking steps to institute suits against the passengers who had failed to pay prices of transportation. Thus according to him he could not be said to have been entrusted with dominion over Corporation's money and as such the present prosecution was misconceived. His case was that he lived with his wife and children and there was no intention to run away. He had merely gone to see his relations in China and Hongkong when the present prosecution was started. He added that he did not take any large sums of money out of the country; the amount withdrawn before his departure was necessary for the purpose of his business here, and the Overseas Travels carried on its business as usual during his absence. With regard to the cheques which had been, dishonoured he stated that he stopped their payments and advised his bankers to refer the payees to him, as this was necessary since he was closing his account with the bank on which the cheques had been drawn; but DO reference was made by the Corporation for nonpayment of these cheques and the present prosecution was commenced in the erroneous belief that he had run away from this country. He asserted that the hasty action taken in seizing his books and papers led to the closure of his Business which prevented him from paying his dues to the Corporation. He, however, acknowledged his liability to pay whatever amount might be found owing by him on proper accounting.

12. We have to consider the evidence in order to be able to see whether the ingredients of a charge of offence under Section 409 of the Indian Penal Code have been established. The prosecution was required to prove that the appellant had been entrusted with dominion over property, i.e., prices of transportation sold in the way of the appellant's business as a commission agent; that the appellant

dishonestly used or disposed of the property and did so in violation of a legal contract which he had made with the Corporation.

13. It was necessary to prove that the prices of transportation which the appellant received were impressed with the character of trust money. Reliance has been placed upon the contract of agency in which he has been described as a commission agent working for and on behalf of the Corporation. The relevant clauses of the agreement to which we have referred would indicate that the appellant was accountable to the Corporation for prices of transportation sold by him at the close of the month or upon presentation of the Corporation's bill. His failure to account was liable to be punished by the stoppage of credit facilities. The question then arises whether the appellant continued to act as the agent of the Corporation even in the matter of realisation of prices of transportation. There can be no doubt that he issued the exchange vouchers as Corporation's agent on the basis of which the Corporation issued air tickets to passengers. M.L. Gupta (P. W. 3) who was authorised to file the complaint on the Corporation's behalf stated in evidence that bills used to be presented to Overseas Air Travels for collection of prices of transportation sold on behalf of the Corporation. It was the appellant's duty to send cheques in settlement of the bills as and when received by him. He added that for every transportation and freight booked by Overseas Air Travels the appellant would remain directly responsible to the Corporation for realisation of the price of transportation or of freight; but the Corporation had nothing to do with the passengers or parties who travelled and booked cargoes on its services. The appellant's firm used to realise prices of transportation or freight from his customer in cash or in cheque. If payment was made by the passenger in cheque, the cheque would be drawn in favour of Overseas Air Travels of which the appellant was the Proprietor. The cheque or cash thus received by Overseas Air Travels would be dealt with by them in their own account and they would make payment to the Air Lines Corporation by their own cheques when bills would be received by them. It transpired in evidence that when a passenger booked passage through the appellant and then cancelled it, the passenger would not be dealt with directly by the Corporation; he would be referred to the appellant in whose favour a credit note would be issued by the Corporation. Thus a refund of air passages or freight booked could not be directly made to the passenger when the booking was done

through the appellant. The witness stated that sometimes it did happen that bills in respect of later vouchers would be issued by the Corporation and they would be paid by the appellant even before bills for the earlier ones were presented.

14. If this evidence stands, as it must, then it is extremely difficult to see how the appellant could be said to have been entrusted with dominion over property belonging to the Corporation. The Corporation had no privity between themselves and the passenger who travelled in its services. The evidence indicates that the Corporation never cared to enquire whether the prices of transportation had in fact been realised from passengers before they submitted their bills. On the case made the appellant was responsible to pay on the basis of the exchange vouchers he issued to the Corporation irrespective of his being able or not being able to realise prices of transportation from customers. The mode of realisation and the way in which the prices of transportation when realised were dealt with by the appellant, would clearly indicate that he was only liable to the Corporation for payment of sums equivalent to the transportation prices; he was clearly allowed to mix the prices realised with his own money. His only liability was to pay the bills when they were presented by the Corporation.

15. The evidence shows that there were instances where prices of transportation had not been realised and yet the appellant paid the prices against bills. K.L. Taori, (P. W. 6) stated that the appellant had paid to the Corporation on the 6th June, 1955 an equivalent amount representing the prices of transportation although it was not actually realised from the party until the 6th of October, 1955. On another occasion payment had been made to the Corporation on the 21st July, 1955 although the price of transportation was not realised by the appellant until the 21st of November, 1955. From the appellant's books seized and exhibited at the trial it appeared, that there were several entries in them showing that prices of transportation had remained unrealised. One of the witnesses S.L. Mah, (P. W. 14) gave evidence to say that substantial amounts representing the prices of transportation sold remained due to the appellant. The witness was an employee of Overseas Air Travels for some time. He deposed with reference to the books of the appellant's firm that steps had to be taken against the Standard Vacuum Oil Company for the purpose of realisation of a sum of Rs. 8000/-which was due on

account of transportation sold to them. He stated that the firm of solicitors Messrs. Leslie and Hinds had been instructed to institute a suit for realisation of the amount and a sum of Rs. 500/- was paid to them towards cost of filing a suit. There is evidence to indicate that on the 12th October a sum of Rs. 8000/- was received by the appellant by cheque from Standard Vacuum Oil Co. Quite clearly this amount represented the price of transportation sold which remained unrealised. It was the appellant who moved in the matter for the purpose of realising the amount. The Airlines Corporation merely stood by and did nothing and left it to the appellant, their agent, to realise the amount. It is not indeed easy to see how this course of conduct could possibly justify an inference that the appellant was acting as an agent right throughout on behalf of the Indian Airlines Corporation. The money which he received could not in such circumstances, be held to be impressed with the character of trust money. There is nothing to indicate that the prices of transportation received by him were to be dealt with in a separate fund. Quite obviously he was allowed to mix up the Corporation's money with his own money. He was never told to hold the price of Transportation in specie. Consequently it is difficult to see how he could be said to have been entrusted with dominion over Corporation's property. The agreement itself was silent on the question as to how the prices of transportation when realised should be dealt with. On the other hand, there are indications in the evidence that the appellant might put the prices of transportation, when realised, into his own funds and pay the Corporation's bills covering the value of the exchange vouchers issued by him. It must, therefore, be held that the appellant was only accountable for an equivalent sum representing the Corporation's claim based on the exchange vouchers issued by him.

16. As we have said the appellant must be held to have issued the exchange vouchers in his capacity as an agent. But then the course of conduct proved by the evidence relative to realisation of prices of transportation sold, would clearly point to the conclusion that when he received prices of transportation from the customers and dealt with the moneys thus received, he did so on his own, and it cannot be said that the relationship of principal and agent still continued between the Corporation and the appellant. As was observed in the case of *Kalyanji Kuwarji v. Tirkaram Sheolal*, AIR 1938 Nag 254 commission agents were agents within

Section 182 of the Contract Act but were not agents pure and simple. They were agents upto a point and to that extent they stood in a position of active confidence towards their principals, but beyond that they were not agents in the real sense of the term and the relationship between the parties from then on was one of debtor and creditor.

17. In the absence of an agreement an agent is not bound to keep separate accounts. From the terms of the contract taken along, with the evidence as regards the actual working of the agency, we have no manner of doubt that the appellant was only liable to the Corporation for sums equivalent to the prices of transportation sold. Indeed the agreement itself postulates the appellant's liability to accounts and visits his failure with forfeiture of credit facilities. On the evidence the Indian Airlines Corporation looked to the appellant for payment and the appellant in his turn looked to the customer for the prices of transportation sold. There was in this sense no privity between the customer and the Corporation. Indeed, Mah's evidence clearly indicates that the Corporation had nothing to do whatever with the passengers who booked passage or cargo on the Corporation's services and that they always held the appellant liable for prices of transportation and freight of cargoes. If the appellant was not bound to keep prices of transportation received from customers in a separate fund, if he was entitled to mix them up with his own money and was liable, when called upon, to hand over an equivalent sum, then he can never be a trustee but only a debtor. The use of the words 'commission agent' need not frighten anybody. The evidence of actual working of the agency and the agreement itself would require to be examined before it could be pronounced whether the relation of principal and agent continued throughout. Indeed, as was observed in the case of *Ganesh Export and Import Co. v. Mahadeolal Nathmal* 0065/1956 : AIR1956 Cal188 that if upon a consideration of all the terms and conditions of the agreement, the so-called agent is proved to have acted on his own, there can be no hesitation in holding that no relationship of principal and agent arises in spite of the contrary description in the agreement. If, therefore, the agreement itself and the evidence relative to the actual working of the agency indicate that the relation of principal and agent disappeared at a later stage, the mere use of the words 'commission agent' in the agreement cannot have the effect of impressing on the prices of transportation

received the character of trust fund.

18. We have said that the evidence discloses that the bills were not always sent by the Corporation in the same order in which the exchange vouchers were issued by the appellant. The evidence also indicates that customers used, not infrequently, to hold back payments and that cheques for consolidated amounts covering prices of transportation for travel on the Corporation's services on different occasions would be issued on a later date in favour of Overseas Air Travels; on occasions payments would be made to the Corporation by the appellant even before realisation had been made from the customers. It cannot, in such circumstances, be said that the moneys which the appellant received were impressed with the character of trust money. If that is so, we do not think a charge of criminal breach of trust could properly be brought against the appellant.

19. We have then to consider the question of dishonest user or disposal of the prices of transportation charged. It was said that the sums were disposed of by the appellant in violation of the terms of the agreement between him and the Corporation. We wish to point out that the evidence discloses a series of transactions between the appellant and the Corporation. It is not easy to isolate them. The evidence, if anything, indicates that it was in the course of a running transaction between the parties that bills were submitted and payments made against them. The total value of transportation sold during 1955 was about Rs. 3,00,000/-, The total value of cheques received by the Indian Airlines Corporation from the appellant during the year 1955 was about Rs. 2,29,519/-. The price of transportation sold between September, 1955 to January, 1956 was Rs. 1,47,000/- ; between September to December, 1955 the appellant was proved to have paid to the Corporation Rs. 90,000/- and odd against their bills, and it appears on the Corporation's accounting that an amount of Rs. 1,23,000/- and odd is due by the appellant to the Corporation. In view of this evidence it is not easy to say that there was no running transaction. It would be artificial in the extreme to isolate just a few instances of actual realisation of prices of transportation and charge the appellant with not having paid them and thereby committed criminal breach of trust in respect of those sums of money. The evidence of M.L. Gupta clearly shows that the crash came simply because three cheques of the total value of Rs. 25,500/-

and odd were not paid. The witness clearly stated that if the cheques had been met there would be no occasion to institute criminal proceedings against the appellant. It seems to us that the Corporation was not sufficiently industrious in checking its own accounts; it allowed clues to accumulate and when the appellant left the country, the Corporation seems to have become panicky and instituted the present proceedings. The appellant's books and papers were seized which brought about a forced closure of the business.

20. There can be no doubt that the appellant was doing pretty good business. The evidence shows that the appellant had asked for an increase of over-draft in his accounts with the bank of China. The Assistant in charge (P. W. 15) said that the bank refused to increase the over draft with the result that the appellant was annoyed and stated that he would take his accounts elsewhere. This witness moved that the total turn-over in the appellant's account amounted to Rs. 20,00,000/- in 1955 and despite several withdrawals in the month of January, 1956 there was left a debit balance with that bank to the tune of Rs. 10,000/- and odd. The appellant had another account with Hongkong and Shanghai Banking Corporation. The officer-in-charge (P. W. 24) of that Bank deposed that between 26th and 27th of January, a sum of Rs. 26,300/- and odd had been deposited in the appellant's account. It is to be recalled that the appellant left the country on the 25th of January. His case was that during his absence the business had been carried on as usual; cheques and cash were deposited in his accounts in the usual course. He left his family behind and was returning to this country when on the way at Rangoon he took freight on learning that a warrant had been issued for his apprehension. He accordingly went back to Hongkong and did not return out of fear. That the business was going on during the appellant's absence has been clearly proved by the evidence; that he left behind him his wife and children has also been proved. The suggestion that before he left the country he withdrew a large sum of money in order to take it away, does not seem to be established by the evidence. We cannot assume that the appellant took out of the country the money which he withdrew from the Bank immediately before his departure. On the contrary there is evidence to suggest that he used to leave large sums of money to meet contingent expenses with the office Superintendent named King. The evidence proves that his cheques were actually cashed after his departure from

this country. That lends strength to the suggestion that he used to leave blank signed cheques for the purpose of meeting emergent expenses in connection with the business. All these do not support the inference that the appellant wanted to run away after having misappropriated the moneys which belonged to the Corporation.

21. The three cheques, Exhibits 11, 13 and 17 which were dishonoured do not appear to us to be directly relevant to the consideration of the question of the appellant's guilt. They are merely evidence of a collateral kind which might suggest a guilty mind. There is, however, material on the record that the appellant had actually stopped payment of these and other cheques and advised the Bank to refer the payees to him. In one case at least the cheque had become stale and therefore could not be paid by the Bank. The mere fact that these cheques were not paid, cannot lead indubitably to the inference that he had the requisite dishonest intention. His case was that although the cheques had been returned with the endorsement 'referred to drawer' no further reference was made to him. Whatever that may be, we are not prepared to say that mere non-payment of the cheques can conclusively establish the charges brought against the appellant.

22. We have to refer to another aspect of the case. Assuming that the appellant was an agent right throughout and that when he received the prices of transportation he did so in his capacity as a selling agent and was accordingly required to make them over directly to the Corporation, the question still remains whether the evidence produced in the case establishes conversion or dishonest disposal of the sums charged. It is to be recalled that a sum of Rs. 397/1 was the subject-matter of the first count of charge; the second count related to Rs. 584/-4 and the third to a total sum of Rs. 931/-. According to the case made these three sums of money had been realised by the appellant which he dishonestly misappropriated. The prosecution seems to have proceeded on the footing that since these amounts had actually been realised from customers or passengers, the appellant was bound to pay these sums to the Corporation and if he did not do so, he must be held liable for their dishonest user in violation of the agreement. It seems to us that the actual realisation of these moneys has been clearly established; but there is no evidence to indicate that the Corporation at all

demanded payment of these several specific sums. What the prosecution did was to select these three sums of money out of several large bills each of which was for a considerable sum of money. The appellant was presented with those bills and when they were not paid, the Corporation charged him with having committed criminal breach of trust in respect of these small amounts mentioned in the bills. This is a procedure which is wholly un understandable. If the case was that the appellant had actually realised a sum of say Rs. 397/1 (the amount mentioned in the first count of charge) then there should be evidence to show that he converted or dishonestly used or disposed, of this sum in violation of the agreement which he had made. There is no evidence to indicate that any demand was made by submitting a bill in respect of this specific amount. What the prosecution did was to pick out this small item out of a bill for a large amount which having remained unpaid, it asked the Court to infer that there was dishonest user or disposal of this small amount inasmuch as the bill which included the amount charged was not paid. This indeed is novel procedure. This is what happened in respect of each of the three counts of charge. Thus there is evidence to prove that the sums mentioned in the three counts were realised by the appellant, but there is no evidence to indicate that any demand was at any time made of the appellant to pay any bills in respect of the amounts charged. Even if no demand was made, it was at least necessary to show that the appellant had not had at the relevant time the money to pay the sums charged. If one looks at the appellant's Bank accounts proved by the prosecution itself, one would at once see that at no point of time did the appellant's credit fall below the total of the sums charged in the three counts. It will be seen that a total sum of Rs. 1912/5 was the subject-matter of the three counts of charge. On the evidence produced by the prosecution it is abundantly clear that this sum was always there in the bank in the appellant's account. Thus there could be no question of conversion or dishonest user or disposal of the three sums charged. Even if we held that the appellant acted as an agent right throughout in his dealings with the Corporation and found that he had been entrusted with dominion over Corporation's property to wit, the prices of transportation sold, the charge on each of the three counts is bound to fail inasmuch as no evidence was produced to prove actual conversion or dishonest user or disposal of the several sums mentioned in them.

23. We cannot help remarking that if the Indian Airlines Corporation authorities were more careful they would have discovered that the appellant had been going beyond his depths in the matter of payment of dues against bills issued by the Corporation. A little industry would have clearly demonstrated that it was unwise to allow the appellant to keep the bills unpaid for pretty long time. There was a provision in the agreement itself under which the appellant's credit could be frozen. Nothing was done with the result that large sums were allowed to accumulate which we fear can never be realised. But that is another matter.

24. The appeal succeeds. The conviction and sentence are set aside and the appellant is acquitted. He will be discharged from his bail bond.

Das Gupta, J.

25. I agree.

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