

Bimal Chandra Bhowmick Vs. the State

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SooperKanoon Citation : sooperkanoon.com/877855

Court : Kolkata

Decided On : Feb-23-1989

Reported in : (1989)2CALLT116(HC)

Judge : Mukul Gopal Mukherji and ;Manabendra Nath Roy, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 313; ;Evidence Act - Sections 91 and 114; ;Indian Penal Code (IPC) - Section 409

Appeal No. : Criminal Appeal No. 230 of 1979

Appellant : Bimal Chandra Bhowmick

Respondent : The State

Advocate for Def. : B.N. Maitra, Adv.

Advocate for Pet/Ap. : Hari Narayan Mukherjee and ;Gouri Dhar, Advs.

Disposition : Appeal dismissed

Judgement :

Manabendra Nath Roy, J.

1. This appeal is directed against the conviction and sentence passed in Special Court Case No. 7 of 1978 in the Court of the Special Judge, Additional Court, Nadia.

2. The accused-appellant Bimal Chandra Bhowmick (here in after referred to as appellant) stood charged Under Section 409 I.P.C. and he was convicted and sentenced under the said Section. He was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 20,000 in default to undergo further rigorous imprisonment for two years.

3. The case of the prosecution-respondent State of West Bengal (hereinafter referred to as prosecution) is that Sri Tarak Chandra Chakraborty, Circle Inspector, Krishnagar (II) Circle informed the J.L.R.O. on 2.9.76 that the appellant, who was a Tahshildar of Block IV under the said Circle was asked to come to the Office of the J.L.R.O. on 31.8.76 for the purpose of checking of some rent receipts and other receipts books but he did not come. On 1.9.76 he came to draw his monthly salary but did not meet the J.L.R.O. and on the following day J.L.R.O. and the said Circle Inspector went to the house of the appellant at Kamarhati and enquired about the Rent Receipt Books, D.C.R. books and the cash that was in his hand and on some pretexts the appellant avoided that and said that without verification of those books at the Block Office at Belpukur nothing could be said and on 3.9.76 those books were checked and after checking it was found that although the appellant had realised Rs. 21,763.47P. he had not deposited the amount in the Bank as required under the law and this misappropriation was brought to the notice of the police by a complaint on 4.9.76 and investigation was done ultimately by D.E.B., Nadia and as per order of the Government, the case was allotted to the Court of the Special Judge, Additional Court, Nadia and accordingly the complaint of this case was filed and the said Special Court took cognizance of it and after examination of witnesses, charge as stated above was framed by the said Court against the appellant and trial proceeded as he pleaded not guilty to the charge.

4. The case of the appellant is that he was not appointed as Tahshildar as stated above and he was not a public servant and as such he is not answerable for the charge framed against him.

5. The Learned Trial Judge after hearing both sides and considering the evidence and materials on record convicted and sentenced him Under Section 409 I.P.C. as stated above.

6. It is contended on behalf of the appellant that the decision of the Learned Trial Judge is wrong and on consideration of the evidence and materials on record, he should have held that he is not guilty of the charge against him and that accordingly he should have been acquitted of the charge against him.

7. Now, the point for our determination is whether or not the order of conviction and sentence passed by the Learned Trial Judge is liable to be interfered with.

8. In order to prove the charge against the appellant the prosecution has in all examined 23 witnesses. The defence has also examined 2 witnesses in support of their defence.

9. P.W. 1 is Tarak Nath Chakraborty, He is a Circle Inspector, Krishnagar (II) Circle and he is posted at Dhubulia. He serves under J.L.R.O., Krishnagar (II). He joined there on 1.3.76. He knows the appellant show, was Tahshildar under the J.L.R.O. at that time. He was to collect the loan amount by granting receipts and he was to deposit amount so collected in the Bank within 7 days of collection. The rent used to be realised by Rent Receipt Books and loan amount by Duplicate Carbon Receipt Book. On requisition by the Tahshildar such books used to be supplied after proper receipt in Register 94.

10. It is also in his evidence that the Rent Receipt Book containing Exts. 2 series was issued to the appellant at first on 10.4.76 for realisation of rents for the year 1382 B.S. and then this book was numbered as 80/82.

11. P.W.-2 is Krishnadhan Sarkar. He is a clerk attached to the office of the J.L.R.O., Dhubulia. He is there for the last 5 years. He knows the appellant who was a Tahshildar and who used to collect rent and loan amount.

12. P.W.-3 is Manik Choudhury. He is a Clerk attached to the Office of the J.L.R.O., Dhubulia. He is in that Office since 28.7,76. He is a witness to the seizure of some Rent Receipt Books, D.C.R. books, etc.

13. P.W.-4 is Sourendra Nath Roy. He is a Lower Division Assistant attached to J.L.R.O.'s Office. Krishnagar (II). He is there since 1973. He knows the appellant. In his presence Rent Receipt Books, D.C.R. Books, Register-94, etc., were seized

as per seizure list which he signed.

14. P.W.-5 is Azizul Haque Mallick. He says that he resides at Dhubulia. He has lands and he pays rents. He knows the appellant. He paid loan amount to him about a year ago and received a receipt vide Ext. 6.

15. P.W.-6 is Parimal Biswas. He says that he resides at Dhubulia. He used to pay rents for his lands to the appellant who is a Tahshildar. He received receipts after payment of rents vide Ext. 7.

16. P.W.-7 is Kamal Chandra Haider. He is an Examiner of questioned documents attached to Documents Examination Bureau under C.I.D. West Bengal. He examined the specimen writings and signatures with the disputed ones and it appears that on examination it was found that the disputed signatures and writings tally with the specimen writings and signatures of the appellant.

17. P.W.-8.-is Jahar Lal Bhattacharyya. He says that he resides at Belpukur and knows the appellant, who is a Tahshildar. He paid rent to him. Hiralal Bhattacharyya is his elder brother who received Rent Receipts on payment of rents. Payments of rent were made vide Exts. 6/1 and 6/2.

18. P.W.-9 is Jibananda Bhattacharyya. He says that he resides at Belpukur, P.S. Kotwali. He also says that he knows the appellant. He is a Tahshildar and he used to collect rents and loans. On payment of the loan to him, he received receipt vide Ext. 6/3. He also repaid loan amount on behalf of his elder brother Nityananda Bhattacharyya to the appellant and received receipt vide Ext. 6/4.

19. P.W.-10 is Kalyan Kumar Bhattacharjee. He is a Dealing Clerk of Nadia Treasury. He deals with the accounts under Head : 029-Land Revenue. He also deals with the registers in which the collection of rents are noted. He says that after collection of rent, Tahshildar, by challan, deposits the same with the State Bank and after receipt of the duplicate and triplicate copies, they entered such deposits in their Registers. He has also said how much money was not deposited.

20. P.W.-11 is Anil Kumar Bakshi. He is an Assistant attached to Nadia Collectorate, Treasury Section. He deals with the Registers relating to repayment

of loan given for purchase of fertilizer. Such repayments are realised by Tahshildar who by triplicate Challan deposits the amounts with the State Bank and the latter sends duplicate and triplicate copies of such Challans to them and against this necessary entries as to repayment are noted in the Registers.

21. He has also said that within the period from 22.3.76 to 1.9.76 no amount has been deposited against Loan Case Nos. 344/F/72-73, 129/F/72-73, 34/F/72-73, 248/F/71-72, 250/F/71-72, 108/F/70-71, 1/F/75-76 and 55/F/71-72.

22. P.W.-12 is Birendra Nath Chakraborty. He is attached to the Treasury Section, Collectorate, as Dealing Clerk. He maintains Registers under Head : 705 A.S.D & Agri. 714 C.D.P. He says that Tahshildars realise the loan amounts and deposit the same by triplicate Challan in the State Bank and the latter sends back the duplicate and triplicate copies of the Challans and against those, necessary entries are made in the Registers.

23. He has also said that within the period 22.3.76 to 1.9.76 no amount has been deposited against loan Case Nos. 91/A.S.D./71-72, 131A. S.D./ 71-72, 48 A.H.B./70-71, 7 S.I./65-66, 1. A.H./70-71, 31 A.H.B./70-71.

24. P.W.-13 is Nihar Ranjan Saha. He is an Assistant, Nadia Collectorate, Treasury Section. He deals with the Register relating to recovery of loan given for cattle purchase. He says that Tahshildars collect such loan and get those sanctioned by Loan Office and thereafter deposit the amount in State Bank by Challan and duplicate and triplicate copies of the challans are sent from the Bank to them and against those Challans entries are made in the Register under Head : 705, Cattle purchase.

25. He also says that within the period from 22.3.76 to 1.9.76 no amount has been deposited on account of recovery of loan in connection with Loan Case Nos. 58/C/71-72, 247/C/71-72, 14C/71-72, 9C/68-69, 26SC/71-72, 174/C/71-72, 18C/69-70 and 185C/65-66.

26. P.W.-14 is Nalini Ranjan Roy. He is an S.I. of Police attached to Kaliganj P.S. On 4.9.76 he was attached to Kotwali P.S, in the same capacity, It appears from

his evidence that on receipt of an message, he arrested the appellant in connection with this case.

27. P.W.-15 is Nitya Ranjan Das. He is a retired S.I. of Police. On 4.9.76 he was attached to Kotwali P.S. as S.I. On that date at about 6-15 p.m. he was the Duty Officer. At that time a written complaint of this case was submitted by J.L.R.O. Krishnagar and on the basis of it he started Kotwali P.S. Case No. 13, dated 4.9.76.

28. P.W.-16 is Kartick Chandra Dutta. He is an S.I. of Police. On 4.9.76 he was attached to Kotwali P.S. as S.I. In connection with this case he forwarded the appellant and two others to Court.

29. P.W.-17 is Jnan Chandra Dutta. He says that in September, 1976 he was attached to D.E.B., Nadia as S.I. of Police. On 11.9.76 he took charge of investigation of this case.

30. P.W.-18 is Biman Bihari Das. He is posted at Dhubulia, Diistrict Murshidabad as J.L.R.O. He was posted in the same capacity in the year 1973-76 at Dhubulia. At that time Tarak Nath Chakraborty was Circle Inspector in his area. He knows the appellant who is Tahshildar of Block No. IV in his Circle and he was in-charge of the appellant. On 2.9.76 P.W. 1, Tarak Chandra Chakraborty told him that in spite of intimation the appellant did not turn up on 31.8.76 and he also did not meet him on 1.9.76 when he came to draw his salary. He submitted a written complaint at Thana.

31. P.W.-19 is Niranjana Maitra. He is Subordinate Judge, 2nd Court, Alipore. On 15.10.76 he was Sub-Divisional Judicial Magistrate, Sadar Sub-Division, Nadia. On that date some specimen signatures were taken in his presence by I.O. of this case in his Court vide Exts. 26/2 and 26/3. On 15.10.76 some specimen writings were taken in his Court vide Ext. 26/4.

32. P.W.-20 is Nepal Chandra Bhowmick. He is posted as Clerk in the Fertilizer Loan Section. Nadia Collectorate. He says that when a loan is granted, a case for that loan amount is started and after repayment of that loan, one copy of the

Challan is sent to them from the Treasury. In the case record of Case No. 34-F/72-73, it appears that no amount has been deposited by challan.

33. P.W.-21 is Bejoy Bhusan Chatterjee. He is an Assistant of Nadia Collectorate. He deals with Cattle Purchase Loan. He says that against each loan a case is started and repayments are made to Tahshildar, who deposits the amounts by Challan to be passed by them and those are to be deposited in the Bank and one copy of such Challan after deposit in the Bank, is sent to them and the fact of such repayment is thereafter noted in the Order Sheet of the case record. In all cases in the Chatlans, the name of the Tahshildar depositing the amount is noted. Case No. 9C of 1968-69 (Loanee Nityananda Bhattacharyya) does not show deposit of any amount by the person taking loan.

34. P.W.-22 is Nemai Ghosh. He is a Lower Division Assistant of Nadia Collectorate and deals with loan taken in respect of cattle purchase. The person taking loan in respect of Case No. 91 'A.S.D. of 1971-72 is Loknath Guin, The said Case No. does not show deposit of any loan amount by Challan.

He has also said that the loan in respect of Case No. 131 A.S.D. 1971-72 is Radharani Das. The said Case No. does not show deposit of any loan amount by Challan. Similarly, he has deposed in respect of Case No. 48 A.H.B./70-71.

35. P.W.-23 is Saraendra Nath Bhattacharjee. He is Assistant of Nadia Collectorate and he is in the Loan Department. He deals with C.D.F. loan.

35(a). He has also said that the person taking loan in respect of Case No. 7 S.I./65-66 is Nakul Chandra Nandy. On 29.3.71 Rs. 100/- was deposited as principal and the same amount towards interest by N. Saha, A.R.O. After 1972 no deposit was made and no deposit was made at any time by the appellant. The person taking loan in respect of Case No. 1 A.H./70-71 is Harprasanna Karfarma. No amount has been deposited by the appellant.

36. Evidence has been led on the side of the prosecution to show that the appellant was a Government Tahshildar as alleged by them and in that capacity he used to realise rents and to recover the amount of loans taken by different

persons as alleged by the prosecution.

37. It appears that P.W.-1, Tarak Nath Chakraborty has deposed that the appellant was in-charge of Block No. III and IV and the appellant made over charge to the Tahshildar, Parimal Sircar on 14.6.76 and the Charge Report has been marked as Est. 30 and the appellant signed it. The said evidence was put forward to the appellant in his examination by the Learned Trial Judge Under Section 313 Cr. P.C. and he replied in the affirmative and said that he made over charge, but he could not remember the date. So apart from any other evidence, it has been an admitted position that the appellant acted as Government Tahshildar and was in-charge of Block No. III and IV.

38. In this connection, question No. 17 which was not forwarded by the Learned Trial Judge in examination of the appellant Under Section 313 Cr. P.C. may be referred to. The reply given by the appellant along with other evidence led by the prosecution, will conclusively go to show that the appellant served as a Government Tahshildar as alleged by the prosecution.

39. It is no doubt true that the prosecution has not produced the agreement entered into between the appellant and the Government as regards collection of such loans, rents, etc. It is also true that the prosecution has not produced the appointment letter relating to him issued by the Government.

40. Exception I to Section 91 of the Indian Evidence Act says that when a Public Officer is required by law to be appointed in writing and when it is shown that any particular person has acted as such Officer, the writing by which he is appointed need not be proved.

41. In this case the prosecution has shown that the appellant has acted as a Government Tahshildar as alleged by the prosecution, In view of the aforesaid provisions, non-production of the agreement and appointment letter relating to the appellant would not mean that he did not act as a Government Tahshildar as alleged by the prosecution. The prosecution has led evidence to show that the appellant misappropriated a sum of Rs. 21,763.47p. realised by him as a Government Tahshildar in connection of realisation of rent of lands and loans

repaid by various persons, who took the same without depositing the same in the Bank as alleged by the prosecution. There is no reason to disbelieve the evidence adduced by the prosecution in this regard.

42. We have taken into consideration both oral and documentary evidence adduced in this case and on consideration of the same in agreement with the Learned Trial Judge we hold that the charge of criminal breach of trust Under Section 409 I.P.C. against the appellant has been proved beyond any reasonable doubt. So, the order of conviction passed by the Learned Trial Judge is not liable to be interfered with. But regarding the sentence, it appears that rigorous imprisonment of 5 (five) years and a fine of Rs. 20,000 is rather excessive. In our view the ends of justice will be met if the appellant is sentenced to suffer rigorous imprisonment for 5 (five) years only and as such the sentence regarding fine of Rs. 20,000 should be set aside.

43. So, the sentence passed in this case is that the appellant shall suffer rigorous imprisonment for 5 (five) years only and the sentence passed against him to pay a fine of Rs. 20,000 in default to undergo a further imprisonment of 2 (two) years is set aside.

44. The sentence is accordingly modified.

45. The appeal thus stands disposed of.

Mukul Gopal Mukherji, J.

46. I agree with the findings as arrived at by my learned brother.

47. An interesting question of law has been raised by Mr. Harinarayan Mukherjee in this case. That is with regard to the onus of proof. Mr. Mukherjee has argued that the best evidence on the question of appointment of the appellant as a Tahshildar has been kept back without any satisfactory explanation whatsoever and since it did not stand proved that the appellant was appointed as such Tahasildar, no charge Under Section 409 I.P.C. could be maintained against him. Mr. Mukherjee further cited before us the decision of the Privy Council reported in

25 C.L.J. 589 in T.S. Murugesam v. Manickavasaka Desika Gnana Sambanda Pandara Sannedhi and Ors. where it was decided inter alia that if the mortgagor withholds account books of the mortgage which are in his possession and which would show the true nature of the debt, the Court is entitled to draw an inference in favour of the mortgagee. This decision was followed, by our High Court in Secretary of State for India in Council v. Upendra Narayan Roy and Ors. reported in Calcutta Law Journal P. 336 for the proposition that if the relevant papers are withheld by the Crown, the Court cannot but draw an inference adverse to the Crown. Yet in another decision in Raja Sreenath Roy and Ors. v. Secretary of State for India in Council and Ors. reported in 26 Calcutta Law Journal 345 at page 355, it was held that the papers which might have thrown light upon the question of the condition of a particular mouza at about the time of the permanent settlement being kept back by the Crown, i.e., the defendant, this Hon'ble Court directed the Trial Court to take steps to secure the production of those other papers relating to the permanent settlement of the relevant mouza and if they are still withheld, the Court must not hesitate to draw an adverse, inference which legitimately arises from the omission to produce the relevant papers. In this context Sir Ashutosh Mookerjee, J speaking on behalf of the Division Bench followed the earlier decision in T. S. Murugesam Manickavasaka Desika reported in 25 C.L.J. 589 (also reported in I.L.R. 40 Madras 402).

48. Even though the proposition laid down by all these decisions are still valid in law, they have no manner of application to the facts and circumstances of the present case in as much as it has not been proved that despite the existence of the relevant documents relating to the appointment of the appellant as a Tahshildar, such documents have been wilfully kept back by the prosecution so that the best evidence on the point was not made available before the Court. It is in evidence no doubt that (he system of maintaining the documents relating to the appointment of the Tahasildar stands proved and according to the said system, the documents pertaining to the appointment of the appellant ought to have been also in proper custody but then a satisfactory explanation has been given on behalf of the prosecution about the loss of such documents which occurred on account of Food Movement taking place in Krishnanagar. We are satisfied on facts that it was not a case of wilful withholding of documents regarding the appointment

of the appellant as Tahasildar by the prosecution but it was a case where such documents unfortunately were found missing. In the circumstances, as explained by the prosecution and because of the absence of such documents, the best evidence, however, could not be produced. We have in view the provisions of Exception 1 to Section 91 of the Evidence Act that when a Public Officer is required by law to be appointed in writing and when it is shown that any particular person has acted as such Officer, the writing by which he is appointed need not be proved. Otherwise the general rule is when the terms of a contract or of a grant or of any other disposition of property, have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself or of secondary evidence of its contents in cases in which the secondary evidence is admissible. We are fully convinced that there have been sufficient evidence on record about the appellant acting as a Tahasildar and the written document as regards his appointment was not necessary to be proved. That apart, the principle Under Section 114 Illustration (g) of the Evidence Act also is not applicable because it is not such a case where the prosecution refused to produce a document or that it is a case of wilful withholding of a document despite its existence where a presumption unfavourable to the prosecution could at all be made.

49. As expressed by my learned brother, we are of the view that the sin of the father should not be vested on the wife and children. Since there is a fine of Rs. 20,000 along with the substantive sentences of imprisonment, the substituted heirs and legal representatives of the original appellant are prosecuting the appeal despite the death of the accused appellant. In view of the fact that we are maintaining the substantive sentence of imprisonment but are setting aside the amount of the fine, the cause of justice would be sufficiently met in the facts and circumstances of the case.

50. In the result, the appeal stands dismissed subject to the setting aside of the amount of fine of Rs. 20,000 imposed on the accused appellant.