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Court : Kolkata

Decided On : Jul-09-1985

Reported in : 1986CriLJ337

Judge : N.G. Chaudhuri and; Gobinda Chandra Chatterjee, JJ.

Appellant : Himadri Adhikari

Respondent : The State

Judgement :

Gobinda Chandra Chatterjee, J.

1. This appeal is directed against the judgment passed by the Judge, 5th Additional Special Court, Calcutta on 15-6-1981 in connection with Case No. 3 of 1975 whereby the accused/appellant Sri Himadri Adhikari alias Thakur was convicted of the offence under Section 409 of the Indian Penal Code and sentenced to six months R. I. and a fine of Rs. 500/- in default to three months R. I. in respect of two heads of charges framed against him.

2. The prosecution case briefly put is that in connection with a Govt. scheme known as Urban Artificial Insemination Scheme attached to the Bengal Veterinary College, insemination fees at the rate of Rs. 2/- for a cow and Rs. 3/- for a buffalo used to be realised by the Inseminators directly from the parties on the spot. The fees so collected by the Inseminators used to be handed over to the Field

Inspectors and the latter used to hand over the money to the Clerk-cum-Cashier, H|imadri. In this way, so the prosecution story runs, a sum of Rs. 2098/- on account of such fees for the period from 30-1-1969 to 3-12-69 was received by Himadri. Again a sum of Rs. 1890/- on account of such fees for a different period namely for the period from 13-2-70 to 10-12-70 was received by the selfsame Cashier Himadri from the Inspectors. Grievance of the prosecution is that the cashier did not show the amount in the cash book and that instead he dishonestly misappropriated the sums as a public servant. Two charges were framed against Himadri for the two period aforesaid under Section 409 of the Indian Penal Code. Himadri pleaded not guilty. His defence was that he was never appointed as a Clerk-cum-Cashier, that he was never entrusted with the sums as alleged, that he never misappropriated the money himself, that the Inspector themselves had misappropriated the sums and that the defalcation was really committed by the officers superior to him. As many as 38 P.Ws. were examined by the prosecution. Relying upon the evidence of those P.Ws. the learned Judge, Special Court convicted and sentenced the accused as indicated above. Being aggrieved by the aforesaid judgment of conviction and sentence Himadri has filed the instant appeal.

3. Mr. Amal Kanti Banik, learned Advocate appearing for the appellant has raised several contentions before us. First of all, he has contended that the joinder of the two charges under Section 409 I.P.C. for two different periods covering more than a year is absolutely illegal and that it has vitiated the trial. Now it transpires from the judgment of the trial court that the court found out the illegality but at the same time the trial court found that the accused was never prejudiced by the said illegality of the charge and as such that defect was curable under Section 464 Cr. P.C. We are, however, unable to agree with this view of the learned Special Court. For it would appear from the materials on the record that there were innumerable items of the alleged receipt of money by Himadri from the Field Inspectors from time to time. All these innumerable items were lumped together to the prejudice of the accused. Indeed, it is difficult to understand and appreciate as to what specific sums of money were defalcated by the accused at a particular point of time. Moreover, it is for the appellate and the revisional court and not for the trial court to adjudge as to whether an irregularity is curable under Section 464 Cr. P.C.

4. Secondly, Mr. Banik has urged that there is no material on the record to show that the accused was ever appointed as a Clerk-cum-cashier. The appointment letter, Ext. A is silent on the point. It simply states that the accused was appointed as a Lower Division Clerk. No order book, nothing of the sort has been produced by the prosecution to prove that Himadri was ever appointed as such. Even, none of the 38 P.Ws. did pledge his oath saying that even on a single occasion a formal order written or parole was ever passed by any of the superiors of Himadri directing him to take charge of the cash of the office. On the contrary as we shall see more clearly in the sequel there were several persons who were entrusted with the task of receipt of the insemination fees from the Inspectors.

5. Thirdly, it has been urged by Mr. Banik that there was no entrustment proper of the money with the accused and that there was no iota of evidence on the record to show that it was the accused and none else who did misappropriate the money. Mr. Banik is right in his submission. For we shall see hereafter that the key of the locker used to remain not only with the accused but at times with the other clerks as well, that one of the duplicate keys used to remain in the custody of the Officer-incharge and that there were occasions when the Officer-in-charge used to retain the custody of the money himself.

6. Fourthly, Mr. Banik has invited our attention to the evidence of the handwriting expert to prove that the majority of signatures appearing on the 'Personal Khata' of the Inspectors did not tally with the specimen signatures of the accused. Grievance put. forward by Mr. Banik is that these personal khatas on which the prosecution case is entirely based were the private note books of the Inspectors themselves, that the Inspectors themselves used to misappropriate the money and no wonder, therefore, that they forged the signature of the accused to save their own skin. We shall presently discuss the evidence on the record and we shall see that the grievance put forward by Mr. Banik is to a large extent real and substantial.

7. Lastly, Mr. Banik has contended that the Journal Book maintained by the accused in the office has been withheld by the prosecution. According to him, the prosecution has also withheld from production the relevant challans and the

duplicate receipt books. The existence of such documents was admitted by some of the P.Ws. This contentions of Mr. Banik as we shall find shortly hereafter is strongly supported by the materials on the record.

8. We have already stated that the prosecution examined in all 38 witnesses. We need not discuss the evidence of all the witnesses in detail. It would suffice for our purpose if we select some important P.Ws. from amongst them. These important P.Ws. are P.W. 1, P.W. 2, P.W. 6, P.W. 7, P.W. 8. P.W. 9, P.W. 12, P.W. 21, P.W. 27, P.W. 28, P.W. 31 and P.W. 32. We shall now discuss their evidence in a nutshell.

9. P.W. 1 is Shri M. Bhattacharyya, Superintendent of the Veterinary Organisation, Ext. 10 shows that he had lodged a complaint before his superiors in respect of the matter which is now under consideration before us. In this complaint, it was stated clearly that prior to March 1971 money collected by inseminators used to be deposited by the Field Inspectors in the A.I. Section and not in the Cash Section. After March 1971 he passed an order directing the Inspectors to deposit the money directly in the Cash Section. Ext. 10 the complaint over which the whole prosecution is based is thus manifestly clear that Himadri even if he is assumed to be the Cashier had nothing to do with the receipt of the money prior to March 1971. From the charge framed it appears that Himadri was accused for his alleged receipt of money for the years 1969 and 1970 when admittedly as per Ext. 10 the sums used to be deposited not in the Cash Section but in the A.I. Section. Moreover Ext. 10 speaks of defalcation of a much large sum i.e. Rs. 6500/-. The present charge is confined to Rs. 4000/- and odd. It is interesting to note in this connection that in the show cause petition Ext.'B', the accused was asked to explain by the department the fact of his defalcation in respect of Rs. 3000/-and odd. It is thus clear from the above that there is no uniformity at all in the prosecution case itself. It varies from stage to stage. From the evidence of P.W. 1 again read with his another report to his superior (Vide Ext. 12) it appears that not only Himadri but there were other 4/5 clerks against whom the department had the self-same complaint in respect of their receipt of the sums from the Inspectors concerned. P.W. 1 has again admitted that the receipt of the sums by Himadri used to be authenticated by Himadri himself in the 'personal khatas' of the

Inspectors and these khatas were never issued by their office. It is difficult to understand and appreciate as to how a Govt. servant like Himadri could be convicted on the basis of a private document not recognised by law, It is also interesting to note in this connection that correspondingly there was a personal khata of the accused himself, that this khata existed in the office and that this khata was not produced by the prosecution. Grievance of the accused is that this khata if produced would have shown the actual state of affairs of the office. The state of affairs of the office was extremely deplorable. For P.W. 1. admitted that he never verified the cash. P.W. 1 again admitted that money used to be received by the officer by challans. We have seen the cash book Ext. 4. The cash book speaks of challans and certain challans are also seen affixed with the Cash Book. Mr. Banik is, indeed, right when he makes a grievance that not a single challan was produced by the prosecution in this case. P.W. 2, Shri S.N. Chatterjee, Officer-in-charge of the scheme also never cared to verify the cash. His evidence is that not only Himadri but two other clerks as well used to receive the cash. Nay, sometimes, he used to write out the cash book himself. The key of the locker wherein the cash used to remain was kept according to him with the accused and sometimes with others as well. P.W. 6, Shri Surjya Kanta Saha used to remain-in-charge sometime as Superintendent. He again speaks about 'Duplicate receipts' as token of receipt of money by the Cash Section. These duplicate receipts also have not been produced by the prosecution. In his evidence, he has admitted that accused was acting as Cashier' by implication only' meaning thereby that there was no formal order written or oral directing him to act as such. P.W. 7, Shri D. Mitra was one of the clerks of the office. His evidence is that the A.I. fees used to be realised not by Himadri alone but by three including himself. According to him there was no Cashier, no accountant in the office and that further it is only at the verbal request of the Officer-in-charge that he used to handle the cash sometimes. P.W. 8 is Shri S.S. Roy, who was an Inspector. From his evidence we gather that account books of the office were never scrutinised by the officers and that on one occasion Rs. 14/- were deposited in the office long two years after the receipt of the money. P.W. 9 is Dr. A. Bose who was for sometime the Inspector-in-charge of the office. His evidence is that the accused Himadri used to receive the money by endorsing his signature on the personal khata of the Inspectors and that there was no other document to prove the receipt of the money. We have already made our comments that conviction of the accused as a Govt. servant cannot be sustained solely on the basis of a private document of another Govt. servant whose conduct again is not flawless. Moreover, we shall presently see that there are clear indications in this case that these Inspectors themselves had misappropriated the sums on some occasions. Again the evidence of the handwriting expert is as we have already indicated before that the specimen signatures of the accused did not tally in a large majority of cases with the signatures appearing on the personal khatas. The next witness P.W. 12 is Dr. N, Chakraborty. His clear evidence is that he used to deposit the collection fees not only with the accused but also with the other clerks as well. The next important witness is P.W. 21, Sri M.L. Chakraborty the Field Officer. The concluding line of his cross-examination is remarkable. To quote his own words 'on good faith money transactions took place between us without any receipt'. This means and implies that there was no system of retention and preservation of any document to prove the deposit of Govt. money in the office. Indeed, we have fallen on evil days. During British regime, we remember that not a single farthing - from the public exchequer used to be spent without something in black and white. No wonder, therefore, that the small A.I. collection fees of Rs. 2/- per cow and Rs. 3/- per buffalo realised from the poor public would be usurped by the officers themselves for their own use. The whole system of maintaining accounts and cash prevalent under the scheme known as Urban Artificial Insemination scheme of our Govt. was thus inherently defective, there being no fixed person as to with whom the collection would remain. P.W. 27, the bull attendant states that once upon a time he even paid Rs. 80/- to the officer-in-charge and that too without any receipt. The materials on the record we regret to point out show that on one occasion, this Officer-in-charge, Shri S.N. Chatterjee kept with him a small amount for long two years. The implication is obvious and we do not desire to dliate upon it unnecessarily. P.W. 28 Shri R.N. Chatterjee used to collect money sometimes. Perhaps, he did not also deposit the money in the Govt. office with the result, that his own department had to address a letter to him demanding that money. Such was also the case with Shri S.C. Chatterjee, the Field Attendant P.W. 32. Similar is also the evidence of Shri A. Mitra, P.W. 31, the Field Attendant. His deplorable evidence is that although one Shri K.D.

Chakraborty was not authorised to receive the cash, on one occasion, the collection money was handed over to him by Shri Mitra. Shri Mitra's further evidence is that there is no document to show that he did thus pay the sum to Shri Chakraborty. The learned Judge, Special Court has found that P.W. 4, P.W. 10, P.W. 11, P.W. 27, P.W. 28 and P.W. 38 did not also deposit snail amounts of money thereby missappropriating the Govt. Fund.

10. We do not thus see any good reason as to why the accused Himadri should be answerable to the charge when the materials on the record make it abundantly clear that the entire system of handling the Govt. Cash was defective, that the accused Himadri was never entrusted solely with the maintenance of the cash and that specially when there is no material on the record to pinpoint, the nature and extent of the job entrusted with the accused. Upon the facts and circumstances elicited in evidence during trial we hold that the accused cannot be held answerable for the charges framed against him. In our opinion, the accused ought to have been held not guilty of the offence under Section 409 I.P.C. both on the grounds of law and facts.

11. In the result, the appeal succeeds. The judgment of conviction and sentence passed against the accused/appellant by the Judge, Special Court is set aside. We find the accused/appellant not guilty of the offence with which he was charged. The accused/appellant is accordingly acquitted of the offence, let him be discharged from his bail bond.

N.G. Chaudhuri, J.

12. I agree.