Jaswantrai Manilal Akhaney

Vs

The State of Bombay

Criminal Appeal No. 152 of 1954

(B. P. Sinha, Vivian Bose, B. Jagannath JJ)

04.05.1956

JUDGMENT

SINHA J. -

This is an appeal by special leave directed against the concurrent orders and judgments of the courts below convicting the appellant under section 409, Indian Penal Code and sentencing him to rigorous imprisonment for three months and a fine of Rs. 201 or in default, further six weeks rigorous imprisonment. As the appellant had been convicted and sentenced for a similar offence in another case tried by the same Presidency Magistrate, 19th Court, Esplanade, Bombay, he directed the sentence in this case to run concurrently with the sentence in the other case. The charge against the accused in the trial court is in these terms :-

> "The Accused is charged under section 409 of the Indian Penal Code for committing criminal breach of trust in respect of property to wit 3% Government Promissory Loan Notes 1966-68 of the face value of Rs. 50,000 and 2 1/2% Government Promissory Notes 1961 of the face value of Rs. 25,000 in or about February to May 1949 entrusted to him in his capacity as Managing Director of the Exchange Bank of India and Africa Ltd. and belonging to the Cambay Hindu Merchants Co-operative Bank. (Detailed charge is separately framed) ".

The appellant at all material times was the Managing Director of the Exchange Bank of India and Africa Ltd., with its head office at Bombay, which hereinafter will be referred to as the Exchange Bank. He held a power of attorney to act as the Managing Director on behalf of the Directors of the Company. By that power the accused was invested with the authority to borrow money on behalf of the Bank. In 1944 the Cambay Hindu Merchants Co-operative Bank at Cambay, which hereinafter will be referred to as the Co-operative Bank, had opened a current account with the Exchange Bank. On instructions from the Co-operative Bank, the Exchange Bank purchased in August 1946 securities worth Rs. 25,000 in its own name with money belonging to the Co-operative Bank and the securities were kept with the Exchange Bank as a cover for overdraft. In March 1948 two further lots of Government security of Rs. 25,000 each of the value of Rs. 50,000 were purchased likewise and left with the Exchange Bank for the same purpose. On the 14th May 1948 the two banks entered into a contract evidenced by three documents to be noticed in detail hereinafter. Shortly stated, the Exchange Bank agreed to grant the Co-operative Bank credit for overdraft up to a limit of Rs. 66,150 and as a security for the overdraft the Government securities of the value of Rs. 75,000 already in the custody of the Exchange Bank was pledged to the latter. These securities of the face value of Rs. 75,000 will hereinafter be referred to as "the securities". But it appears that the Co-operative Bank had no occasion to operate on the overdraft account until the 28th February 1949

when the crucial event happened, namely, the Exchange Bank finding itself in an embarrassed financial position took a loan from the Canara Bank of one lakh of rupees by pledging the securities as also other securities with which we are not concerned in this case. On the 24th April 1949 the Exchange Bank paid off the dues of the Canara Bank by taking a fresh loan of the same amount of one lakh from Messrs Merwanji Dalal & Co. and pledging the same securities as had been pledged to the Canara Bank. On the 28th April 1949 Messrs Merwanji Dalal & Co. demanded back their money by the forenoon of the day following. As the Exchange Bank could not pay the amount as demanded, the pledgees aforesaid sold those securities including the securities belonging to the Co-operative Bank, for realising their dues, on the 3rd May 1949.

In the meantime, in answer to a letter from the Co-operative Bank to the Exchange Bank asking for a certificate for the securities held by the latter on behalf of the former in the overdraft account, the Exchange Bank issued the certificate dated the 1st April 1949 to the effect that at the close of business on the 31st March 1949 it held Government of India securities of the total value of Rs. 75,000 as security against the overdraft facilities granted to the Co-operative Bank and that there was no overdraft against the said securities on that date. Subsequently, on the 29th April 1949 the Co-operative Bank wrote to the Exchange Bank asking the latter to hand over securities of the face value of Rs. 50,000 to the Central Bank. The Central Bank also on behalf of the Co-operative Bank made a similar demand and as the Exchange Bank did not comply with that requisition, the Central Bank informed the Co-operative Bank by a letter dated the 3rd May 1949 that the securities had not been handed over to the Central Bank as directed by the Co-operative Bank. The Co-operative Bank then wrote to the Reserve bank for stoppage of the securities of the value of Rs. 25,000. It became clear by then that the Exchange Bank was not in a position to return the securities to the owners, that is to say, the Co-operative Bank.

In spite of the best efforts of the appellant as the Managing Director of the Exchange Bank, to stave off the crisis by borrowing money from different sources, the run on the bank became so great that the directors applied for and obtained from the Company Judge of the Bombay High Court a moratorium of 15 days. On the 18th May 1949 a provisional liquidator was appointed in respect of the Exchange Bank on a creditor's application and on the 24th June 1949 the Official Liquidator was appointed to wind up the bank. On the 25th June 1949 one M. N. Raijee as agent of the Official Liquidator lodged information with the police charging the appellant with breach of trust in respect of a number of securities including the securities belonging to the Co-operative Bank. On the 31st October 1949 a charge-sheet was submitted by the police under section 409, Indian Penal Code against the appellant in respect of the securities of the face value of Rs. 75,000 belonging to the Co-operative Bank. On the 4th April 1952 the charge as quoted above was framed against the appellant. The delay of about two and a half years in placing the appellant on trial is attributable to the fact that at the request of the accused the trial in respect of this charge was stayed pending the disposal of the other case against him.

At the trial the prosecution examined the Manager of the Co-operative Bank as P. W. 1. He proved the transactions between that Bank and the Exchange Bank. The second witness for the prosecution was a partner in the firm of Messrs Merwanji Bomanji Dalal during the material time. He proved the transaction of the loan by his firm to the Exchange Bank of one lakh of rupees on the pledge of the securities belonging to the Co-operative Bank, as also other securities. He deposed to the fact that it was the appellant who finalised the transaction on behalf of the Exchange Bank. He also proved that in default of payment by the Exchange Bank on demand by his firm, it sold the securities including the securities in question and realised the dues from the Bank from the sale proceeds of securities of the value of one lakh of rupees. The third witness for the prosecution was

the Chief Accountant of the Exchange Bank who functioned as such till the 2nd May 1949 when the Bank closed down. He also had a power of attorney from the Bank to act jointly with another person with a similar power of attorney. According to this witness, the appellant as the Managing Director exercised the powers of borrowing, raising money, purchasing, selling and pledging of bonds, scrips and other forms of securities on behalf of the Bank and its constituents during the relevant period and that no one else exercised those powers. He also testified to the fact that there was a crisis in the affairs of the Bank from about the middle of February 1949 and that there was a rush on the Bank which continued till it closed down. He also proved the fact that during the material time the Co-operative Bank had a credit balance in its favour and that there was no overdraft by that Bank from the Exchange Bank. He proved Exhibits E, F and G which are the documents evidencing the contract between the two banks in respect of the pledge of the security. He corroborated the previous witness that it was the appellant who negotiated and finalised the loan of one lakh of rupees from the Canara Bank and that the securities in question along with others had been pledged to the Canara Bank. It was he who had endorsed the securities to the Canara Bank. He stated that the Exchange Bank had submitted to the Canara Bank a declaration to the effect that the said securities belonged absolutely to the Exchange Bank. As there was a heavy rush of depositors on the bank, the loan from the Canara Bank was taken to satisfy the demand of the depositors. The most important witness examined on behalf of the prosecution is P. W. 4, Ganpati Venkatrao Kini. He was an accountant in the Exchange Bank during the relevant period. He was also working with the Official Liquidator of the Bank after its liquidation was ordered by court. Like the previous witness, he also had a power of attorney to act only in conjunction with another person holding a similar power. He supports the previous witness in saying that the power of borrowing money or of purchasing, selling or pledging or repledging securities was exercised by the appellant and by no other person on all material dates. He also corroborates the previous witness and states that there was a crisis in the bank from about the middle of February 1949 and that there was a heavy rush on the bank from that time till it closed down. He also proves Exs. E, F and G and states that from the 14th May 1948 when these documents were executed between the two banks till the 2nd May 1949 when the Exchange Bank closed its doors there was no overdraft by the Co-operative Bank which always had a credit balance. He also gives the details of the transaction of the loan of one lakh between the Exchange Bank and the Canara Bank and the details of the securities pledged by way of security for that loan. He makes the following very significant statement :-

> "I had handed over the two securities belonging to the Cambay Co-operative Bank to the accused for being handed over to the Canara bank against the loan. The accused actually asked me for these securities and I handed them to the accused".

To a court question as to why he did not bring it to the notice of the appellant that the securities in question belonged to the Co-operative Bank and not to the Exchange Bank, his answer is in these words :-

> "In fact, the accused himself told me to bring securities pleged by the Cambay Co-operative Bank with the Exchange Bank".

He also proves Ex. L. which is a very important document in this case and proves that it was signed by the accused. He further states that the declaration in that document that the securities represented the Exchange Bank's investments was not correct. He also makes detailed statements as to the different kinds of interest which the appellant had in the Exchange Bank. He was drawing Rs. 2,500 as monthly salary as the Managing Director. He was also drawing a salary of Rs. 1,000 from the Union Life Assurance Co. Ltd., as its Managing Director. The Insurance Company and its branches

had a current account with the Exchange Bank and had advanced to the latter six to seven lakhs of rupees as "call deposits". The appellant was also connected with Messrs L. A. Stronach Ltd., Advertising Agents, which had been given overdraft facilities by the Exchange Bank. The appellant was also getting Rs. 2,000 per month as salary from the aforesaid Advertising Agents. The appellant and his wife were the principal shareholders in Akhaney & Sons Ltd., who were the Secretaries and Treasurers of the Indian Overseas Airlines. The Exchange Bank had advanced to the aforesaid Indian Overseas Airlines a loan of one crore and ten lakhs of rupees and Messrs Akhaney & Sons Ltd. aforesaid were getting a remuneration of Rs. 2,500 per month from the Indian Overseas Airlines Ltd. It would thus appear that the appellant along with his wife in one way or another was getting about Rs. 8,000 per mensem as remuneration from the different companies referred to above which were closely associated with one another from the financial point of view and that the appellant was the chief person concerned with them and the connecting link between them. It was naturally his interest to see that the Exchange Bank continued its existence as long as could be arranged even by borrowing large sums of money when there was already a run on the bank. It is in the background of all these facts as circumstances that the appellant's acts of commission and omission had to be judged. The other four witnesses, P. Ws. 5 to 8 are more or less formal witnesses in the sense that they have proved certain documents and letters which need not be noticed. The evidence of P. W. 2 had to be set aside as he was not available for cross-examination after charge, being out of the country.

The appellant's defence is disclosed in a long written statement running into twenty paragraphs and seven closely typed pages submitted on the 3rd October 1952. Shortly stated, it is to the effect that the charge framed against him is bad in law and extremely vague; that the vagueness of the charge had "considerably handicapped" his defence, that the prosecution had not been fair in that it had not examined the first informant, M. N. Raiji, that if he had been examined by the prosecution, the appellant would have shown from the records in his possession that the Co-operative Bank had not suffered any loss and that the Bank in the hands of the Liquidator had more than sufficient funds to pay the dues of the former; that the prosecution had not been launched with the sanction of the Company Judge who was in seisin of the liquidation proceedings in respect of the Exchange Bank and that therefore the provisions of sections 179 and 237 of the Indian Companies Act had not been complied with; that the securities in question had not been entrusted to the appellant but to the Exchange Bank, if at all there was any entrustment, and that as a matter of fact and law, the Exchange Bank had not been entrusted with the securities, that the Exchange Bank "could legally deal with the securities in any manner it liked", as provided in the documents, Exs. E, F and G, between the two banks; that the sub-pledging of the securities with the Canara Bank or with Messrs Merwanji Bomanji Dalal was "perfectly within the four corners of the law", and that the essential ingredients of an offence under section 409, Indian Penal Code had not been made out. Grievance was also sought to be made of the fact that Inspector Milburn who had investigated the case had not been called as prosecution witness, with the result that the appellant had been deprived of the right of challenging the prosecution evidence with reference to the police diary.

The learned Magistrate after a very fair and full examination of the evidence in the case and the points raised by the appellant in his defence came to the conclusion that the appellant was guilty of the offence of criminal breach of trust under section 409, Indian Penal Code and passed a lenient sentence, as stated above, in view of the consideration that "not a pie went to the pocket of the accused", and that "the accused had not taken up any dishonest defence". The learned Magistrate held that the charge as framed was not vague in view of the provisions of section 222, Criminal Procedure Code, with special reference to the terms of sub-section (2) of that section. On the question of the non-examination of the first informant, M. N. Raiji, and of the investigating police

officer, the learned Magistrate observed that they were formal witnesses inasmuch as the facts of the case were not in dispute. Furthermore, the court observed that if the accused or his lawyer who defended him at the later stage of the prosecution, had applied to the court for their being examined, they could have been called as witnesses and subjected to cross-examination by the accused. But no such application had been made. As regards want of sanction of the Company Judge, he held that section 179 of the Indian Companies Act had no application to the facts of the present case, as it was not a prosecution under the Companies Act and that therefore no such sanction as is contemplated by that section was necessary. Dealing with the appellant's contention that there was no entrustment within the meaning of section 405, Indian Penal Code the learned Magistrate observed that the accused held delegated powers from the Board of Directors and he held the property in trust on behalf of the Directors of the Exchange Bank. He further held that the contract of pledge dated the 14th May 1948 between the two banks did not vest any right in the Exchange Bank absolutely to deal with the securities and that at any rate, the Exchange Bank could not deal with the securities so long as the Co-operative Bank had not taken an overdraft from the former. In dealing with the question whether the appellant had dealt with the securities dishonestly, he held that in all the circumstances of the case there was no doubt that wrongful loss was caused to the Co-operative Bank and wrongful gain not to the accused personally but to the Exchange Bank which he represented during the transactions in question.

On appeal to the Bombay High Court, a Division Bench of that court dismissed the appeal substantially agreeing with the findings of the trial court. Dealing with a new point raised before the appeal court, namely, that the appellant was under a mistake of fact or law as to the indebtedness of the Co-operative Bank to the Exchange Bank or as to its powers to deal with the security, the High Court held that there was no possibility of the appellant having made any mistake of fact in good faith. The court also pointed out that the appellant himself had not raised this plea of mistake either about the facts of the case or about any doubtful question of law. The court also pointed out that declarations made by the appellant on behalf of the Exchange Bank that the securities belonged absolutely to the bank and represented its investments - statements which he knew were false. While dealing with the appeal on the question of sentence, the High Court pointed out that there was good evidence to support the inference that the appellant had been actuated by motives of personal benefit also. In that view of the matter the High Court maintained the conviction and the sentence passed by the trial Magistrate. The appellant then moved the High Court for a certificate that the case was a fit one for appeal to this Court. The certificate was refused by that court. Thereafter the appellant moved this Court and obtained special leave to appeal.

In support of the appeal the learned counsel for the appellant has raised a number of questions of law and at the forefront of his argument contended that both in law and on a proper construction of the contract between the two banks the appellant was fully entitled to pledge the securities as long as the overdraft agreement subsisted, irrespective of whether or not there was an actual overdraft by the Co-operative Bank on the date of the pledge, that is to say, on the 28th February 1949.

Examining the position with reference to the contract between the two banks, we find that Exhibits E, F and G, all dated the 14th May 1948, are parts of the same transaction and evidence the terms of the contract between them. Ex. E is a promissory note executed by the Co-operative Bank in favour of the Exchange Bank for the sum of Rs. 66,150 with interest at three per cent. per annum with half yearly rests. Ex. F is a letter addressed by the Co-operative Bank to the Exchange Bank enclosing Ex. E and Ex. G is the bond pledging all marketable securities and goods to the Exchange Bank in consideration of its promise to grant credit for overdraft limited to the amount aforesaid in favour of the Co-operative Bank from time to time with interest at three per cent. per annum as aforesaid. The

significant portion of the bond is in these terms :-

> "..... and we agree and undertake that in the event of our failure to maintain the margin on the said movable property marketable securities and goods in the manner hereinafter provided or failing repayment on demand to you by us of the amount of such advance or credit with interest cost charges and expenses as aforesaid you shall be entitled, but not bound, to sell or otherwise dispose of all or any of the said movable property marketable securities and goods by public auction or private contract in such manner and upon such terms and subject to such conditions as you may think fit without any reference to us or obtaining our consent, and the proceeds of such sale or disposal shall be applied first in payment of all costs charges and expenses of and incident to such sale or disposal and the enforcement of the pledge and charge in your favour hereby created, secondly in repaying the amount of such advance or credit with interest as aforesaid and all costs charges and expenses incurred by you in relation thereto not otherwise met including loss in exchange (if any) and all other debts and monies however due to you by us and lastly in payment to us of the surplus if any thereafter remaining, declaring as it is hereby expressly provided agreed and declared that this shall be continuing security to cover the amount of any advance or credit which you have allowed to us or may from time to time allow us with interest costs, charges and expenses and all other debts and monies due as aforesaid..... ".

Reading Exhibits E, F and G together, it is clear that the securities of the face value of Rs. 75,000 were pledged to the Exchange Bank as security for overdraft up to the limit of Rs. 66,150 for which the Co-operative Bank had given the promissory note to the Exchange Bank. It was further stipulated that in the event of the pledgor making a default in payment on demand of the amount advanced by way of overdraft with outstanding interest it may be realised by the Exchange Bank by sale of those securities and after satisfying the pledgee's dues against the pledgor, if there was any outstanding amount the surplus of the sale proceeds shall be paid back to the pledgor. Thus it is clear that according to the terms of the contract the Exchange Bank was not entitled, as contended on behalf of the appellant, to sell the securities even though there may not have been any outstanding dues from the Co-operative Bank. The securities were to be kept by the Exchange Bank charged with the payment of such amount as may from time to time have been advanced or be advanced under the overdraft arrangement. But that charge was not an absolute one without reference to the state of accounts between the two banks; in other words, there would be a charge only when there was an adverse balance against the Co-operative Bank. We know that at all material times the Co-operative Bank had not drawn any sum from the Exchange Bank in pursuance of the agreement referred to above. The right of the Exchange Bank to deal with the securities under the agreement would arise only on the happening of certain events, namely, that the pledgor either had failed to maintain the proper margin or had made a default in repayment of the outstanding amount on demand by the Exchange Bank. So long as those contingencies did not arise, - and it is nobody's case that any of those contingencies had arisen, - the pledgee bank had no right to deal with the securities by way of pledge, sub-pledge or assignment. In this connection our attention was invited to the provisions of section 179 of the Indian Contract Act in support of the contention that as the securities had been agreed between the two banks to be a cover for overdraft not exceeding Rs. 66,150, up to that amount the pledgee bank had an interest in those securities which it could have dealt with. It was further argued that as there was nothing to show that the appellant had dealt with the securities for a larger amount than that, he could not be said to have contravened the terms of the contract. In our opinion, there is no substance in this contention. Section 179 predicates that the

pledgor has a limited interest which he can deal with and his transaction to that extent would be valid. If the Co-operative Bank had as a matter of fact operated upon the overdraft account and had drawn any sum within the limit aforesaid, the Exchange Bank would have an interest pro tanto in those securities and might then have been entitled to pledge or sub-pledge the securities with a third party. But so long as there was no overdraft by the pledgor, the pledgee had no such interest as it could in its turn pledge or sub-pledge to a third party. Furthermore, it is clear from the narrative of events given above that the appellant dealt with the securities with third parties on the footing, after an express declaration had been made by him, that those securities were the absolute property of the Exchange Bank. We are not here concerned with the question of the extent of interest acquired by such third party. We are only concerned with determining the legal position as between the two banks, the Exchange Bank being represented by its Managing Director, the appellant. Hence there is no difficulty in holding that on the terms of the contract between the two banks the appellant was not entitled to transfer any interest in those securities and if he did so, he did it in contravention of the terms of the contract.

We will now deal with the legal position, apart from the terms of the contract. On the facts stated above the Exchange Bank had become the bailee in respect of the securities. The securities had been delivered by the Co-operative Bank to the Exchange Bank for the express purpose, as disclosed in the contract set out above, that they shall be disposed of in accordance with the terms contained in Exhibit G set out above. By the very fact of the delivery of the securities to the bailee the latter became a trustee in terms of the contract, not for all purposes, but only for the limited purpose indicated by the agreement between the parties. The pledgor has in the present case only transferred his possession of the property to the pledgee who has a special interest in the property of enforcing his charge for payment of an overdraft, if any, whereas the property continues to be owned by the pledgor. The special interest of the pledgee comes to an end as soon as the debt for which it was pledged is discharged. It is open to the pledgor to redeem the pledge by full payment of the amount for which the pledge had been made at any time if there is no fixed period for redemption, or at any time after the date fixed and such a right of redemption continues until the thing pledged is lawfully sold. Hence the Co-operative Bank in this case could have asked for a return of the securities at any time, because there never was any overdraft. As the pledge had been terminated neither by redemption, nor by a lawful sale on the happening of such contingencies as the parties contemplated in their agreement or the law allowed, the securities continued to be the property of the Co-operative Bank and the Exchange Bank, or the appellant as its Managing Director, had no right to deal with them.

It was next contended, alternatively, that assuming that the Exchange Bank had dealt with the securities in contravention of the terms of the agreement, the appellant had, as representing the bank, only committed a breach of contract, the remedy for which was a suit for damages and not a criminal prosecution. This argument assumes that the same set of facts cannot give rise both to a civil liability and a criminal prosecution. It is manifest that such an argument in its bald form cannot be acceptable. If there is no mens rea, or if the other essential ingredients of an offence are lacking, the same facts may not sustain a criminal prosecution, though a civil action may lie. We have therefore to examine whether or not there was mens rea in this case or whether the necessary element of a criminal offence have been made out.

It has been contended that no offence under section 409, Indian Penal Code has been brought home to the appellant for the reasons, (1) that there was no entrustment, (2) that there was no mens rea, and (3) that there was no dishonesty on the part of the appellant. For an offence under section 409, Indian Penal Code, the first essential ingredient to be proved is that the property was entrusted. It

has been argued that in this case there was no such entrustment as is contemplated by that section; and that the securities were pledged with the Exchange Bank by the Co-operative Bank which was in the position of a debtor to the former. The contention is that the parties never contemplated the creation of a trust in the strict sense of the term. But when section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him. In the present case the Co-operative Bank entrusted the Exchange Bank with the securities for the purpose of keeping them as a security for the overdrafts if and when taken by the former. In law those securities continued to be the property of the Co-operative Bank and as it never borrowed any money from the Exchange Bank, the latter had no interest in those securities which it could transfer in any way to a third party so far as the two banks are concerned. The entrustment was to the Exchange Bank itself. But it being a non-natural person, its business had to be transacted by someone who was authorised to do so on its behalf. The appellant held the power of attorney on behalf of the directors of the bank to transact business on behalf of the bank. In that capacity the appellant had dominion over the securities. Hence the appellant can be said either to have been entrusted with the property in a derivative sense or to have dominion over the securities as a banker; and thus in either case, the first essential condition for the application of section 409, Indian Penal Code is fulfilled.

On the question of mens rea, it has to be determined whether or not the appellant dishonestly disposed of those securities in violation of any of the terms of the agreement aforesaid. As already indicated, the appellant did dispose of these securities in violation of the terms of the contract between the two banks. But still the question remains whether he did so dishonestly; in other words, whether when disposing of those securities the appellant had the intention of causing wrongful gain to the Exchange Bank or wrongful loss to the Co-operative Bank. In our opinion, he intended both and, as a matter of fact he caused wrongful loss to the pledgor bank and wrongful gain to the pledgee bank. The Exchange Bank raised money on those securities which it was not entitled to do and the Co-operative Bank was deprived of those securities, even though not for all times. It is settled law that a deprivation even for a short period is within the meaning of the expression. If he disposed of those securities with the intention of causing wrongful loss to the one and wrongful gain to the other, there can be no question but that the appellant had the necessary mens rea.

It was next argued that assuming that the essential ingredients of an offence under section 409, Indian Penal Code had been made out, the appellant may have made a mistake of fact in assuming that the Co-operative Bank was indebted to the Exchange Bank or may have made a mistake of law in mistakenly believing that the Exchange Bank had the right as the pledgee to sub-pledge those securities for raising money for its own purposes. We know as a fact that the Co-operative Bank had not taken any overdraft from the Exchange Bank. But it was argued that it had not been proved that the appellant had that knowledge. The appellant in his long written statement has not tried to take shelter behind any such mistake. He was in full control of the bank accounts and as pointed out by the courts below, it is impossible to believe that in the circumstances in which the bank had found itself and when the appellant was hard put to it to collect all the bank's resources to stave off the

severe crisis through which it was passing, the appellant would not have known the fact that the Co-operative Bank did not owe his bank any money by way of overdraft. Hence, in our opinion, there is no room for the supposition that the appellant was not aware of the true state of accounts between the two banks. But then it was argued that the appellant may have made a mistake of law in thinking that he was justified by law in dealing with those securities. The attempt is to bring the case within one of the general exceptions contained in Chapter IV of the Indian Penal Code and set out in section 79 in these terms :-

> "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it".

In considering a matter of this kind the attitude of the accused is an important consideration. We note that here the appellant made no attempt in the trial court to set up such a defence. If he had ever said that he made a mistake of fact after exercising due care and caution that there was an overdraft against the Co-operative Bank in favour of the Exchange Bank, he may have been able to take advantage of the exception. But as in this case there was no mistake of fact and as the court was in a position to find that the appellant must have known that there was no such overdraft, there is no room for the application of section 79 quoted above. The appellant cannot avail himself of the exception of section 79 simply by saying that he believed that in law he was entitled to deal with the securities as the property of the Exchange Bank, as he attempted to do in his written statement. If he had further proved that he believed in good faith that the Co-operative Bank was indebted to his bank, his belief that he was justified by law in dealing with the securities as the property of the bank may have helped to bring him within the exception. But as there was no mistake about the basic fact, the provisions of section 79, Indian Penal Code are not attracted to this case.

It now remains to deal with certain objections relating to the illegality or irregularity in the procedure followed in the trial of this case. It was argued that this prosecution was incompetent for the reason that no sanction of the Company Judge had been obtained under section 179 of the Indian Companies Act. The relevant portion of section 179 is as follows :-

> "The official liquidator shall have power, with the sanction of the Court, to do the following things :-
>
> #(a) to institute or defend any suit or prosecution, orother legal proceeding, civil or criminal, in the name and onbehalf of the company....."##

In terms the section lays down the powers of the official liquidator. Such a liquidator has to function under the directions of the court which is in charge of the liquidation proceedings. One of his powers is to institute prosecutions in the name and on behalf of the company under liquidation with the sanction of the court. This section does not purport to impose any limitations on the powers of a criminal court to entertain a criminal prosecution launched in the ordinary course under the provisions of the Code of Criminal Procedure. Where a prosecution has to be launched in the name of, or on behalf of, the company, it naturally becomes the concern of the Judge to see whether or not it was worthwhile to incur expenses on behalf of the company and therefore, the section requires the sanction of the Judge before the liquidator can undertake the prosecution or defence in the name of and on behalf of the company. The present case is not a prosecution in the name or on behalf of the company; nor is the official liquidator interested in prosecuting the case. The prosecution was

started on a charge-sheet submitted by the police, though the first information report had been lodged by an official under the official liquidator. This was not a prosecution initiated or instituted by the official liquidator. This is not a case which can come even by analogy within the rule laid down by the Federal Court in the case of Basdeo Agarwalla v. King-Emperor [[1945] F. C. R. 93.], that a prosecution launched without the previous sanction of the Government within the meaning of clause 16 of the Drugs Control Order, 1943, was completely null and void. In that case their Lordships of the Federal Court had to consider the effect of the following words of clause 16 aforesaid :-

> "No prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government..... ".

It will be noticed that section 179 of the Companies Act does not contain any words similar in effect to those quoted above. Where the legislature intended to place a limitation on the powers of the court to take cognisance of an offence unless certain conditions were fulfilled, like the provisions of sections 196 and 197, Criminal Procedure Code, it has used words such as these : "No court shall take cognisance..... ". There is nothing in section 179 of the Companies Act which can be construed as restricting the powers of the court to take cognisance of an offence or the powers of the police to initiate prosecution or even of a private citizen to move the machinery of the criminal courts to bring an offender like the appellant to justice. For a prosecution for breach of trust even by a director of a company no such condition precedent as the previous sanction of any authority is contemplated by law, unless it is a prosecution in the name and on behalf of the company by the official liquidator who has to incur expenses out of the funds of the company. Section 179 is an enabling provision to enable the liquidator to do certain things with the sanction of the court. It does not control the general law of the land.

It was next contended that the charge as framed by the trial court was illegal and vague and had caused material prejudice to the appellant. The charge as framed has already been set out. The learned trial magistrate had stated at the end that a detailed charge was to be separately framed. But no such charge is before us and the appeal has proceeded on the assumption that no such detailed charge was as a matter of fact framed by the trial court. The question therefore is whether the charge, such as it is, complies with the requirements of the law. It has been argued on behalf of the appellant that the charge is materially defective in so far as the nature of the breach of trust, the facts constituting the breach, the exact date and manner of the breach have not been set out. The charge as framed fulfils the requirements of section 221, Criminal Procedure Code, because it has mentioned the name of the offence, namely, criminal breach of trust and specified section 409, Indian Penal Code, which impliedly gives notice to the accused of every legal condition required by law to be fulfilled in order to constitute the offence of criminal breach of trust. It has also fulfilled the requirements of section 222(1) of the Code in so far as it has specified the securities in respect of which and the Co-operative Bank against which a criminal breach of trust had been committed. Those particulars, in our opinion, were sufficient to give the accused notice of the matter with which he was charged. The trial court has made reference to the provisions of sub-section (2) of section 222. But it was in error in relying upon those provisions which relate to the offence of criminal breach of trust or dishonest misappropriation of money, which was not the present case. It is true that the manner of the commission of the offence as required by section 223 of the Code has not been set out. But that has to be set out only when the nature of the case is such that the particulars required by sections 221 and 222 had not given the accused sufficient notice of the matter with which he is charged. In our opinion, though the charge could have been more detailed as was intended by the learned Magistrate, as framed, it gives the accused sufficient notice of the nature of

the offence alleged against him. Even assuming that there were certain omissions in the charge, they cannot be regarded as material unless in terms of section 225 of the Code it is shown by the accused that he had in fact been misled by such omission or that there had been a failure of justice as a result of such error or omission. The illustrations under that section show that each case has got to be judged on its own particular facts and there cannot be any general presumption that every error or omission in a charge has materially affected a trial or occasioned a failure of justice. In this case from the long written statement filed on behalf of the appellant it is clear that he was aware of the gravamen of the charge against him and that he tried to meet it in all its bearings. We are not therefore impressed by the argument advanced on his behalf that the omissions in the charge are material and that the case should be tried over again on a fresh charge. The learned Judges of the High Court constituting the Division Bench which heard the appeal have written separate but concurring judgments, but they did not notice any argument having been advanced before them on the question of the illegality or irregularity in the charge. That also would show that the appellant did not make it a grievance at the time of the argument of the appeal, though a ground had been taken in the memorandum of appeal that the charge as framed was vague and defective and as such bad in law. In our opinion, this is not a case in which it can be said that the omission in the charge has materially affected the trial of the case or prejudiced the appellant in his defence or has occasioned a failure of justice.

As all the grounds raised in support of the appeal fail, it is accordingly dismissed.

</html