

# **BOMBAY HIGH COURT**

State

Vs.

Dahyalal Dalpatram

Criminal Appeal No. 1136 of 1958

(Shah and V.S. Desai, JJ.)

05.01.1959

## **JUDGMENT**

**Shah, J.**

1. This is an appeal by the State of Bombay against an order of acquittal passed by the Additional Sessions Judge, Mehsana, acquitting in appeal the accused Dahyalal Dalpatram who was convicted by the Judicial Magistrate, First Class, Radhanpur, of an offence under Section 409 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two months and to pay a fine of Rs. 200/-.

2. The accused Dahyalal was employed in the Revenue Department of the State of Bombay as a Talati of the Piparala Seza which consists of four villages - Piparala, Roza, Madhatra and Gramdi in the Santalpur Taluka of Radhanpur Sub-Division District Banaskantha. One Vagha Ganga had unauthorisedly cultivated land near the village pond of Roza in the year 1951-52 and 1952-53. An enquiry was started by the Mamlatdar of Santalpur in that behalf and the Mamlatdar directed the accused to recover from Vagha Ganga Rs. 4/- as fine for each year for unauthorised cultivation and Rs. 1/12/- as assessment. In enforcement of the order of the Mamlatdar, the accused recovered from Vagha Ganga Rs. 13/9/- sometime between 18th May, 1955 and July 1955, but he did not credit the amount in the revenue account. The accused was transferred to another village in the month of July 1955 and one Ganesh was appointed Talati of Piparala Seza. Ganesh inspected the revenue accounts and found that Vagha Ganga was shown as a debtor for the amount directed to be recovered from him as fine and assessment, and he accordingly called upon Vagha Ganga to pay the amount. Vagha Ganga appeared before Ganesh and showed him a receipt issued by the accused Dahyalal acknowledging receipt of Rs. 13/9/- from Vagha Ganga. Thereafter an enquiry was started against the accused, and in the course of the enquiry the accused made two statements before the Prant Officer Radhanpur. In his first statement, dated 1st May, 1956, the accused told the Prant Officer that he had given the receipt for Rs. 13/9/- to

Vagha Ganga in acknowledgment of receipt of the amount, and that the amount was not credited in the Government Treasury nor was it credited in the Government accounts and it had remained with him "due to oversight" but he had not intentionally committed any default. In his reply to the notice issued to him, the accused informed the Mamlatdar that the amount which was recovered by him from Vagha Ganga was not recovered by him as "Government dues", that after he had recovered that amount from Vagha Ganga he had returned the same to the latter and that he had not misappropriated the amount and that he had obtained a receipt from Vagha Ganga for repayment of the amount. The accused was thereafter charged before the Judicial Magistrate, First Class, Radhanpur, for having committed criminal breach of trust in respect of the amount of Rs. 13/9/- and having thereby committed an offence under Section 409 of the Indian Penal Code.

3. Before the learned Magistrate the accused contended that the State of Bombay was not entitled to recover from the cultivators of Jahagirdari lands, assessment or fine for unauthorised cultivation and that the Jahagirdar of the village was entitled to recover the same till the Jahagir Abolition Act was brought into force on 1st August, 1954 and that one Viramji Harbhanji Jahagirdar of the village Roza had asked him to recover the amount from Vagha Ganga and he had recovered the same from Vagha Ganga and had passed a receipt and subsequently the amount was returned to Vagha Ganga who paid over the same to the Jahagirdar and, therefore, he - the accused - had not committed any offence.

4. The learned trial Magistrate held that the accused had recovered the amount of Rs. 13/9/- from Vagha Ganga and had misappropriated the amount, that the State of Bombay was entitled to recover the amount and that the story of the accused that he had returned the amount to Vagha Ganga was untrue. He accordingly convicted the accused of the offence charged against him.

5. Against the order of conviction an appeal was preferred by the accused to the Court of Session of Mehsana at Palanpur. The learned Additional Sessions Judge held on the evidence that some time before the month of July 1955 the accused had collected an amount of Rs. 13/9/- from Vagha Ganga in enforcement of the order of Mamlatdar, dated 8th November, 1954, and that the amount was not credited by the accused in the revenue account maintained by him. But in the view of the learned Judge as the amount was not due from Vagha Ganga to the State of Bombay, by appropriating the same the accused did not commit an offence of criminal breach of trust, even though in his view the defense of the accused that the amount had been returned to Vagha Ganga and Vagha Ganga had paid it over to the Jahagirdar was not true.

6. The learned Judge observed in the course of his Judgment :

" ..... it must be held that when the accused recovered the amount from Vagha, Vagha was not liable to pay any amount to the Government. It is thus clear that the accused had recovered the amount from Vagha by misrepresenting the facts to him and the accused thus can be said to have committed the offence of cheating punishable under Section 420

of the Indian Penal Code. The accused, however, cannot by any stretch of imagination be held to have committed the offence punishable under Section 409 of the Indian Penal Code as he had not recovered any dues belonging to the Government and as such he cannot be said to have been entrusted with the amount in his capacity as a public servant."

and on that view he acquitted the accused. Against the order of acquittal passed by the learned Judge the State of Bombay has preferred this appeal.

7. There is little dispute as to the facts found by the courts below. That the accused was a Talati of Piparala Seza in 1954-55 and as such a public servant is not denied. He has also admitted that he had recovered Rs. 13/9/- from Vagha Ganga pursuant to the order of the Mamlatdar, dated 8th November, 1954. It is also undisputed that this amount is not credited in the account maintained by the accused. That the amount of Rs. 13/9/- was collected by the accused in his capacity as the Talati, i.e. as a public servant employed in the revenue department, is also undisputed. The trial Magistrate found that the accused had not returned the amount of Rs. 13/9/- to Vagha Ganga and that the receipt, exhibit 5/1 was a fabricated document. The Additional Sessions Judge agreed with that view, and no substantial argument has been advanced before us which would justify us in taking a different view on that question. The learned Judge has pointed out that if the accused had returned the amount of Rs. 13/9/- to Vagha Ganga, there was no reason why he should not have called upon Vagha Ganga to return the receipt, Exhibit 5/1, which had already been issued by him to Vagha Ganga. The receipt Ex. 21 on which reliance is placed by the accused does not bear the thumb mark of Vagha Ganga. He disbelieved the evidence of Viramji Harabhanji that the amount of Rs. 13/9/- was paid to him by Vagha Ganga. The amount is not shown as credited by Viramji in his books of account, and except the bare word of Viramji there is no other evidence which supports that case. We, therefore, agree with the view of the learned Additional Sessions Judge that the amount of Rs. 13/9/- was not returned by the accused to Vagha Ganga and was appropriated by him. The question which then falls to be determined is whether in appropriating the amount of Rs. 13/9/- recovered in enforcement of the order of the Mamlatdar to himself, the accused was guilty of the offence of criminal breach of trust.

8. In the view of the learned Additional Sessions Judge the State of Bombay was not entitled to recover this amount from Vagha Ganga; and in support of that view he had relied upon exhibit 10/5, which is a letter addressed by the Assistant Secretary to the Government of Bombay, Political and Services Department, to all Collectors in the Northern Division. That letter recites that for the Jagir villages in the Banaskantha district the Jahagirdars not having executed any agreement (relinquishing their interest), the orders treating properties like rivers, river-beds, mountains, etc., situated in the villages of the Jahagirdars as State property "had no legal basis", and that specific provision in that behalf was made in the Bombay Merged Territories and Merged Areas (Jagirs Abolition) Act 1953, and that in the circumstances the orders issued by the Government of Bombay by letters dated 17-2-1953 and 5-8-1953 should be treated as cancelled and that the question of recovering the income, if any, which the Jagirdars may have realised from the said properties from the date of merger till the issue of the orders did not arise. It

appears from this letter that the Government was advised that until the enactment of the Bombay Merged Territories and Merged Areas (Jagirs Abolition) Act 1953 the State had no right to recover income from properties like river-beds and mountains situated in the villages of the Jagirdars in the Banaskantha District and intimation in that behalf was given to the Collectors and communicated also to the Mamlatdars. It may, therefore, be assumed that the State of Bombay had no right to recover assessment and fine from Vagha Ganga for unauthorised cultivation of land near the village pond of Roza.

9. The learned Additional Sessions Judge thought that because the State was not entitled to enforce liability for recovering the fine and assessment in respect of the land the accused had not committed an offence of criminal breach of trust in appropriating the amount recovered in enforcement of the order of the Mamlatdar, dated 8-11-1954, and that if at all the accused may have committed an offence under Section 420 of Indian Penal Code, viz., the offence of cheating. But it was not the case of the prosecution nor of the defence that the accused had by a false representation persuaded Vagha Ganga to pay him the amount of Rs. 13/9/-. It was the case of the accused that he had recovered that amount in his capacity as Talati of the village Roza and that he issued a receipt in that behalf to Vagha Ganga. It was never even suggested that in recovering the amount from Vagha Ganga the accused was not acting as a public servant: and there is a finding by the Courts below that the amount was recovered by the accused in his capacity as a public servant. Does the fact that the alleged liability for the amount collected by the accused could not have been lawfully enforced by the State by revenue or other lawful process make any difference as to the consequence of appropriation of the amount collected by him? The learned Additional Sessions Judge was of the view that it did.

In his view, the amount which was collected by the accused did not belong to the State, and consequently it could not be regarded as entrusted to the accused. In paragraph 5 of his judgment he observed; "The Talati was, however, not recovering the amount from Vagha which belonged to the Government and as such it cannot be said that the accused was entrusted with the funds which belonged to the Government or over which he had dominion or control in his capacity as a public servant"; and in support of that view he relied upon a judgment of the Allahabad High Court, *Surendra Pal Singh v. The State*<sup>1</sup>,

10. We are unable to agree with the learned Judge. Section 405 of the Indian Penal Code defines the offence of criminal breach of trust, and in so far as it is material it states :

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property ..... commits 'criminal breach of trust.'"

The accused as a Talati employed under the revenue Department was invested with authority to collect land revenue and fines ordered to be recovered under the Land Revenue Code from land-

holders. When any amount is collected as a tax or fine by the accused as a Talati from a landholder the money collected by him becomes public fund and the accused becomes entrusted with that fund. If liability for payment of any amount was lawfully enforceable against a landholder, and the amount was collected by the accused as a Talati, it is undisputed that when the amount reached his hand he became entrusted with that amount. When the accused collected the amount as tax alleged to be due by a landholder, though the liability whereof could not be enforced according to law, could it be said that he was then entrusted with the money? On this question the Allahabad High Court appears to have taken the view that a public servant collecting money claiming that it was due to the State, but which in fact was not due to the State, could not be regarded as entrusted with the money collected by him. But evidently Section 405 of the Indian Penal Code does not contemplate that the property in respect of which an offence of criminal breach of trust may be committed must be property which belonged to the complainant. Provided there is entrustment of property, it matters little whether the complainant on whose behalf the property is entrusted is the owner thereof or not. If authority be needed in that behalf, there is an old judgment of the Calcutta High

<sup>1</sup> AIR 1957 All 122

Court in which it was held that Section 409 of the Indian Penal Code does not require that property in respect of which criminal breach of trust is committed should be that of Government; it should have been entrusted to a public servant in that capacity (see *In re, Ram Soonder Poddar*, 2 Cal LR 515). The accused being a public servant and having received in his capacity as a public servant an amount of Rs. 13/9/- from Vagha Ganga, in our judgment he was entrusted with that amount and he was bound to pay the same in the Government treasury or to account for the same under the rules made in that behalf under the Land Revenue Code. The accused having misappropriated the amount entrusted to him, it must be held that he has committed criminal breach of trust in respect thereof.

11. In AIR 1957 Allahabad 122, it appears that the accused, who was an employee of the revenue department of Uttar Pradesh, collected an amount of Rs. 596/14/- from certain cultivators as canal dues when only an amount of Rs. 398/4/6 was due from them. On the allegation that out of the amount collected by him the accused credited to the State Rs. 398/4/6 and appropriated the balance to himself, the accused was prosecuted for the offence of criminal breach of trust. It was observed in that case by the High Court that the balance of Rs. 198/9/6 which was appropriated by the accused to himself was never due to the State and it was, therefore, never the property of the State at any stage, and that when the accused realized that sum of money it did not become State property nor did the accused ever become its trustee on behalf of the State. It was also observed that when the amount was handed over by the cultivators to the accused, he could not become the trustee of the money on behalf of the cultivators because the cultivators had purported to surrender all their rights in the money, their intention being that the money should go to the State and it was in pursuance of that intention and for its fulfillment that they handed over the money to the accused and, therefore, the money was not held by the accused as a trustee

on behalf of the cultivators.

12. But the assumption that before an offence under Section 409 can be committed by an accused person the property in respect of which the offence is committed must be shown to be the property of the State does not, in our judgment, appear to be warranted by the plain words used in that section. The law merely requires that there must be entrustment of property to a public servant or broker, merchant or agent, and breach of the trust committed by him in respect of the property entrusted. Even if the State was not entitled in law to collect the amount from the taxpayer, when the amount was received by the accused acting as a public servant in exercise of his duties, he held the amount for and on behalf of the State and in his hand it became part of the public fund and when he misappropriated that amount, in our judgment, he committed the offence of criminal breach of trust.

13. The decision in *Emperor v. John McIver*<sup>2</sup>, on which reliance was placed by Mr. Shah has, in our judgment, no bearing on this question. In that case a charge was made against the person accused for offences under Sections 406 and 420 of the Indian Penal Code. Thereafter the accused compounded with the complainant for the offence under Section 420 and the Court acquitted the accused. An application in revision was filed to the High Court and the High Court directed a trial of the accused for the offence under Section 406 of the Indian Penal Code. A contention was then raised at the

<sup>2</sup> AIR 1936 Mad 353

trial for the offence under Section 420 of the Indian Penal Code which was raised against him on the identical facts on which the charge under Section 406 was sought to be pressed against him. Mr. Justice Lakshmana Rao disagreed with that view, but having regard to the majority decision the accused was ordered to be acquitted. But in that case the Court was not called upon to decide the question whether a person who as an agent had received money on behalf of his principal to recover which the principal could not have resorted to legal process, and had misappropriated the same can be regarded as having committed an offence of criminal breach of trust. Nor did this question fall to be determined in *Lake v. Simmons*<sup>3</sup>, which was relied upon by Mr. Shah for the accused. That case was decided upon the interpretation of a policy of insurance. The view expressed by their Lordships was that loss of property by deception was not "loss by theft or dishonestly committed by a customer or broker" within the meaning of the clause contained in the policy.

14. In our view, the accused having received the amount in his capacity as a Talati from Vagha Ganga in satisfaction of an alleged liability of the latter to pay assessment and fine, the accused committed the offence of criminal breach of trust when he misappropriated that amount. (Rest of the judgment is not necessary for the purposes of this report. Ed.)

Appeal allowed

<sup>3</sup>1927 AC 487