



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

DATED : 8<sup>th</sup> SEPTEMBER, 2015

S.B. : HON'BLE MR. JUSTICE S. P. WANGDI , JUDGE

Crl.Rev.P. No.18 of 2014

Revisionist-Petitioner : Abhijit Dasgupta,  
Aged about 34 years,  
S/o Late Santosh Dasgupta,  
R/o Flat No.1'A',  
Silver Screen Apartment,  
Patel Road,  
Pradhan Nagar,  
Siliguri, West Bengal.

versus

Respondent : The State of Sikkim

Application under Sections 397/401  
read with Section 482 of the Code  
of Criminal Procedure, 1973

Appearance

Mr. N. B. Khatiwada, Senior Advocate with Mrs. Gita Bista and Ms. Monika Rai, Advocates for the Revisionist-Petitioner.

Mr. Abhijit Das Gupta, Revisionist-Petitioner in person.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor for the State-Respondent.

## J U D G M E N T

### Wangdi, J.

1. This Revision Petition filed by the Revisionist-Petitioner seeks to assail judgment dated 29-11-2014 passed by the Learned Principal Sessions Judge, East Sikkim at Gangtok, in Crl. Appeal No.02 of 2014, upholding the judgment of the Learned Judicial Magistrate, South Sikkim at Namchi, dated 29-06-2013 in General Register Case No.10 of 2013, by which he was convicted for the offence under Section 409 of the Indian Penal Code, 1860 (for short "IPC") and sentenced him to undergo simple imprisonment for 2 (two) years and to pay a fine of ` 6,000/- (Rupees six thousand) and in default of payment of fine, to undergo further simple imprisonment of 6 (six) months.

2. The genesis of the case against the Petitioner is traced to a written complaint dated 11-08-2012, Exhibit 1, lodged in the Temi Police Station, South Sikkim, by one Shri N. T. Bhutia, P.W.1, Branch Manager of the State Bank of India (for short "SBI"), Singtam Branch, who was holding temporary charge of

the Branch Manager of the SBI, Temi Branch, South Sikkim, stating that some unknown person had surreptitiously transferred ` 9,14,000/- (Rupees nine lakhs and fourteen thousand) from the Branch Subsidy Account No.11892388517 to different individual Savings Bank Accounts, particularly, Account No.317088108398 and 103642954006. Temi P.S. Case No.23(8)12 dated 11-08-2012 under Sections 403/409/420 read with 120B IPC was accordingly registered by the Temi Police Station against unknown person(s) and investigation taken up.

**3(i).** During the course of the investigation, relevant bank documents were scrutinised and upon such scrutiny, it was revealed that the Revisionist-Petitioner took charge as the Branch Manager of SBI, Temi Branch, with effect from 02-11-2010 and during his tenure certain illegal transfer of funds were found to have been made from the Subsidy Account of the Branch to 5 (five) personal accounts of varying sums on different dates to the tune of ` 11,20,000/- (Rupees eleven lakhs twenty thousand). It was further revealed

that the Revisionist-Petitioner used to go to Siliguri, West Bengal, on Government holidays and visited singing bars, named, 'Alishan', 'Harbour', 'Tinkers', etc. Due to his frequent visits to these bars, he befriended the organisers of the programmes and enjoyed their hospitality on credit and also borrowed money when intoxicated and spent it lavishly on himself and the performing artists by way of tips.

(ii) On his return to his duty at the SBI, Temi Branch, he would transfer various amounts from the Subsidy Account of the Branch to the accounts of various individuals to pay his dues and in such manner he had transferred ` 11,20,000/- (Rupees eleven lakhs twenty thousand) to 5 (five) personal bank accounts from the Subsidy Account of the Bank. It was also revealed that the Revisionist-Petitioner had refunded the misused amount by cheque to the Bank from his account. The Petitioner having found to have committed an offence under Sections 403/409/420 IPC, charge-sheet was filed against him for those offences for trial.

4. The Learned Judicial Magistrate upon examination of the evidence found the Revisionist-Petitioner guilty under Section 409 IPC and was accordingly, convicted and sentenced in the manner already stated.

5. In Appeal against the conviction and sentence, the Learned Principal Sessions Judge upheld the judgment and sentence passed by the Learned Juridical Magistrate by the impugned judgment dated 29-11-2014 against which this Revision Petition is preferred.

6. Before considering the merits of the Appeal, it would be appropriate at the threshold to deal with the preliminary objection raised on behalf of the State-Respondent on the maintainability of the Revision Petition. It was submitted by Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, that the jurisdiction of this Court in interfering with concurrent findings of facts of the Courts below is limited. The Learned Additional Public Prosecutor first of all placed reliance upon *Duli Chand vs. Delhi Administration : (1975) 4*

*SCC 649*, to submit that "*the jurisdiction of the High Court in a criminal revision application is severely restricted and it cannot embark upon a reappreciation of the evidence*" that "*it is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice that this Court would interfere with such finding of fact*". Reference was also made to a number of other decisions on this but, it would be sufficient to mention ***State of Kerala vs. Puttumana Illath Jathavedan Namboodiri : AIR 1999 SC 981*** and ***State of Haryana vs. Daya Nand : (2004) 7 SCC 670***. It is argued that by filing the Revision Petition the Revisionist-Petitioner seeks to re-open the case by inviting this Court to re-examine, re-assess and to re-appreciate the evidence.

7. Mr. N. B. Khatiwada, Learned Senior Advocate, appearing on behalf of the Revisionist-Petitioner, on the other hand, would submit that the High Court in exercise of its powers under Section 401 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") can interfere with the judgments of the Courts below and that, its jurisdiction is not so restricted as is being urged on behalf of the State-

Respondent. Relying upon *State of Maharashtra* vs. *Jagmohan Singh Kuldip Singh Anand and Others* : AIR 2004 SC 4412, it was submitted that "*if necessary, the High Court or Sessions Court can exercise all appellate powers*". That Section 401 Cr.P.C. confers powers on the High Court or Sessions Court, as the case may be, to examine the evidence "*for the purpose of satisfying itself or himself as to the correctness, legality or propriety or any finding, sentence or order, recorded or passed and as to the regularity of any proceeding of such inferior Court.*" He would submit that the width and amplitude of this power can be exercised by the High Court as a second appellate power. It is urged that having regard to the ratio laid down in *Jagmohan* (supra), this Court has ample jurisdiction to re-examine, re-assess and re-appreciate the evidence notwithstanding the fact that in the present proceedings concurrent findings of facts by the Courts below are involved.

**8.** On the anvil of the above law, let us now examine as to whether the present case falls within the category of "rare and exceptional case" and whether there is some manifest illegality or grave and serious

mis-carriage of justice that calls for interference by this Court on the finding of facts by the Courts below.

9. Amongst the grounds raised by the Revisionist-Petitioner set out in the Revision Petition, Mr. N. B. Khatiwada, Learned Senior Counsel, confined himself only on the following: -

- (i) The two Savings Bank Account Nos. 317088108398 and 103642954006 to which a total sum of ` 9,14,000/- (Rupees nine lakhs and fourteen thousand) was said to have been transferred, as per the complaint, Exhibit 1, from the Subsidy Account of the Bank bearing No.11892388517, did not tally with the 5 (five) non-home accounts to which money had been allegedly transferred and also that it had not been explained as to how the sum of ` 9,14,000/- (Rupees nine lakhs and fourteen thousand) had been arrived at as mentioned in the FIR;
- (ii) The Courts below had not considered the evidence of P.W.2, Tarun Kumar Das, that the password of an individual ID is only known to the concerned individual. If this evidence had been considered, the misuse of the password and ID of P.W.2, Tarun Kumar Das and P.W.13, Prajwal Tamang, by the Revisionist-Petitioner alleged against him could not have been believed.





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- (iii) That if it was possible for the Revisionist-Petitioner to have misused the password and ID of P.W.2 and P.W.13, it was equally possible for them to have misused the ID and password of the Revisionist-Petitioner which had also been applied to transfer some of the amounts in favour of the non-home accounts.
- (iv) The beneficiaries of the illegal transfers of the funds, namely, Sanjeev Chhetri, P.W.5, Abdus Samad Sekh, P.W.6, Partha Bhattacharjee, P.W.7 and Mrs. Rina Dey, P.W.9, also ought to have been charged as accused apart from the fact that two persons, namely, Sonali Chatterjee and Joydev Baksi, were neither made witnesses nor charged as accused.
- (v) When it was in the evidence of P.W.5, Sanjeev Chhetri, that he did not have the proof to show that the Revisionist-Petitioner used to visit 'Hotel Alishan', CC TV recording which, as per the witness, existed ought to have been seized but, was not done so by the I.O., P.W.14, Karma Tshering Bhutia, when the evidence was vital for the prosecution. On this, reference was made to ***Tomaso Bruno and Another vs. State of U.P. : 2015 Cr.L.J. 1690*** (paragraph 42).
- (vi) No Cheques drawn for different amounts totalling to ` 1,86,000/- (Rupees one lakh eighty six thousand) were also not seized when it is in



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the evidence of P.W.6, Abdus Samad Sekh, that such payments were made through cheques.

- (vii) The I.O., P.W.14, had failed to seize any documents or bills from the singing bars when it ought to have been done considering the evidence of P.W.7, Partha Bhattacharjee, that bills of the customers taking credit would contain the remark "due for payment".
- (viii) The prosecution had failed to prove the identity of the witnesses who claimed to be the employees of the singing bars.
- (ix) The case of the prosecution that the Revisionist-Petitioner used to converse with the owners of the singing bars on their mobile phones to confirm the transfer of the sums but, no call records were produced in evidence.

For the aforesaid reasons, it was the submission of Mr. Khatiwada that an adverse presumption ought to be drawn against the prosecution.

**10.** Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, seriously contested the Revision Petition and submitted that the grounds urged on behalf of the Revisionist-Petitioner were considered by both the Courts below which, after examining oral



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and documentary evidence available on the records, arrived at concurrent findings to conclude that the Revisionist-Petitioner was guilty of having transferred the money from the Subsidy Account of the Bank to the account numbers of P.Ws 5, 6, 7 and 9. Since the findings were based upon well-grounded reasoning, it would not be permissible for this Court to interfere with those in revisional jurisdiction. The Learned Additional Public Prosecutor took us through the various portions of the judgment of the Learned Judicial Magistrate and the impugned judgment of the Learned Principal Sessions Judge to demonstrate that those Courts had duly taken into consideration the points urged on behalf of the Revisionist-Petitioner.

**11.** I have carefully examined both the judgments of the Learned Trial Court as well as that of the Learned Appellate Court and am inclined to agree with the submissions made by the Learned Additional Public Prosecutor.

**(i)** On the first point as regards the discrepancy in respect of two accounts as pointed out on behalf of



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the Revisionist-Petitioner, the Learned Appellate Court is found to have elaborately dealt with the question by dedicating 5 (five) paragraphs and held that Exhibit 26 and Exhibit 29 which are the Statements of Accounts pertaining to account numbers 103642954006 and 317088108398, were those of Mrs. Rina Dey, P.W.9 and Partha Bhattacharjee, P.W.7, respectively thereby rejecting the contention.

(ii) On the second point as regards the misuse of password and ID, the Learned Appellate Court has again by a detailed reasoning in paragraphs 40 to 43 of the impugned judgment held the contention to be of no substance. I have also carefully examined the evidence of P.W.2 and find that the password of individual ID would be known only to the concerned individual and, that there was no evidence of P.W.2 and P.W.13 having disclosed their IDs and passwords to the Revisionist-Petitioner. However, the evidence of P.W.3, Puranjay Shikdar and that of P.Ws 5, 6, 7, 8 and 9, establishes that it was the Revisionist-Petitioner who had transferred the various sums of money to their

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accounts as revealed by their Statements of Accounts, Exhibits 25 to 29.

**(iii)** P.W.5, Sanjeev Chhetri, is a part-time music performer at Hotel Alishan, Siliguri, and in his evidence it has come that the Revisionist-Petitioner used to visit the hotel frequently during weekends and consume wine and enjoy music. That he used to generously tip the singers. That initially he used to tip the performers and pay the bills in cash but, later on he began to run short of money and would take credit assuring to deposit the dues in the accounts of anyone of the employees who held accounts in the SBI and that he had transferred money roughly about 20 times in his bank account total of which amounted to ` 80,000/- (Rupees eighty thousand).

**(iv)** Similarly, P.W.6, Abdus Samad Sekh, running a singing Bar, namely, 'Harbour', Siliguri, West Bengal, in his evidence confirmed overall payment of ` 1,86,000/- (Rupees one lakh and eighty six thousand) by the Revisionist-Petitioner in the account of his staff,

P.W.7, holding a SBI account over a period of 6 (six) months.

(v) P.W.7, Partha Bhattacharjee, a singer at "Harbour Singing Bar" at Siliguri, West Bengal, corroborated the statement of P.W.6 that the Revisionist-Petitioner had sent an overall sum of ₹ 1,86,000/- (Rupees one lakh and eighty six thousand) in his SBI account to be paid to P.W.6 against the dues to the bar.

(vi) The evidence of P.W.8, Erashad Ali, a staff at "Tinkers Singing Bar", Siliguri, West Bengal, also reveals that the Revisionist-Petitioner used to visit the bar on Saturdays and Sundays where he used to drink and enjoy performance and music and that he would tip the performers heavily and his bill used to run up to about ₹ 10,000/- (Rupees ten thousand) to ₹ 20,000/- (Rupees twenty thousand) a day and, in about 5 (five) transactions, the Revisionist-Petitioner had sent about ₹ 80,000/- (Rupees eighty thousand) to ₹ 90,000/- (Rupees ninety thousand).

(vii) P.W.9, Mrs. Rina Dey, is found to have corroborated the evidence of P.W.8 when it has come in her evidence that she had given her SBI account to him to enable the Revisionist-Petitioner to remit the amount due to the bar and that the amount was paid to her brother, Raju Saha, who owned the "Tinkers Singing Bar".

(viii) On a careful examination of the Statements of Accounts, Exhibits 25, 26, 28 and 29 of P.W.5, Sanjeev Chhetri, P.W.9, Mrs. Rina Dey, one Sonali Chatterjee, and P.W.7, Partha Bhattacharyee, respectively in correlation with the Bank Subsidy Account No.11892388517, marked Exhibit 30, it reveals that the transfers of money made to the accounts of P.W.5, 7, 9 and the said Sonali Chatterjee, on various dates from the Subsidy Account, Exhibits 30, invariably tally. These documentary evidence considered with the oral evidence of P.Ws 5, 6, 7, 8 and 9 which have remained firm and unshaken on all substantial parts, establishes the Revisionist-Petitioner having committed the offence. The evidence of P.W.3,



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Puranjay Shikdar and P.W.4, Prabir Kumar Mazumdar, who conducted the inspection under the instruction of the Regional Manager, SBI, considered along with the evidence of P.W.2, Tarun Kumar Das and P.W.13, Prajwal Tamang, the bank employees subordinate to the Revisionist-Petitioner whose ID and password had been used by the Revisionist-Petitioner, would fully corroborate the documentary evidence and the evidence of P.Ws.5, 6, 7, 8 and 9, alluded to earlier. In my view, the evidence is clinching in establishing the guilt of the Revisionist-Petitioner.

**12.** Under these circumstances, particularly, the insurmountable eye-witness accounts of the Revisionist-Petitioner having visited the bars, the documentary evidence read conjointly with the evidence of P.Ws 2, 3, 4 and 13, the other contentions as regards the failure on the part of the prosecution to seize the CC TV recording, bills, etc., at the bars, are of no consequence. Even the other grounds, as regards the non-identification of the persons as being employees of the singing bars, failure to charge the beneficiaries of the funds as accused in the case, failing





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to seize the call records of the mobile phones and the bills and vouchers from the bars, would also be of no consequence. In any case, those are found to have been dealt with by the Courts below and rejected by detailed reasoning with which I have no reason to differ.

**13.** On ground no.(vi) of paragraph 9 that cheques were not seized, it is observed that when it has been established by evidence of P.Ws 2, 3, 4 and 13 who are the Bank employees and, of the beneficiaries P.Ws 5, 6, 7, 8 and 9, that the transfers of the various sums were made electronically, the stray evidence that the payments were being made through cheques, would be of no consequence.

**14.** In the very decision of *Tomasu Bruno* (supra), it has been held as follows:

**"39.** It is a settled proposition of law recently reiterated in the following cases viz. Dayal Singh And Ors. v. State of Uttaranchal (2012) 7 SCALE 165 : (AIR 2012 SC 3046), Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688, Umesh Singh v. State of Bihar (2013) 4 SCC 360 : (AIR 2013 SC 1743) that there is possibility of some variations in the exhibits, medical and ocular evidence and it cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of

the accused. Where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused."

**15.** In the present case, the contradiction and variations as well as the inadequacies pointed out on behalf of the Revisionist-Petitioner do not appear to be so serious as to destroy the substantive case of the prosecution for the reasons already stated earlier.

**16.** No glaring feature which would have tantamounted to gross mis-carriage of justice, was brought out to persuade me to interfere with the impugned judgment.

**17.** I also do not find any error on the correctness, legality or propriety or any finding, sentence or order, recorded or passed, in the impugned judgment. It is trite that it is only for examining such aspects that the High Court or Sessions Court can exercise all appellate powers under Section 401 Cr.P.C. In *Jagmohan* (supra), relied upon on behalf of the Revisionist-Petitioner, it has been held that "*the provisions contained in Section 395 to Section 401, Cr.P.C. read*

*together do not indicate that the revisional power of the High Court can be exercised as a second appellate power".*

**18.** The other evidence, the proverbial nail in the coffin, which clinches the case of the prosecution against the Revisionist-Petitioner are the letters dated 12-09-2012, Exhibit 8 and dated 03-10-12, Exhibit 4, written by the Revisionist-Petitioner to the Branch Manager, SBI, Temi Branch. By the letter, Exhibit 4, the Revisionist-Petitioner requested for depositing a cheque for ₹ 11,30,000/- (Rupees Eleven lakhs thirty thousand), Exhibit 3, in the Bank Office Account to make good the shortfall in Branch Subsidy Account further informing that he was "*trying to arrange more funds, if more shortfall occurs in future*". A similar request was made by him in his earlier letter, Exhibit 8. The letters, Exhibits 4 and 8, leave no room for doubt that the Revisionist-Petitioner had indeed made the illegal transfers to the non-home accounts as held by the Learned Trial Court in paragraph 98 of its judgment and, also am in agreement with the opinion of the Learned Appellate Court at paragraph 53 of the



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impugned judgment, that if the Revisionist-Petitioner was confident of not having defalcated and siphoned off the amounts to the Bank Accounts of P.Ws 5 to 9, there would have no reason for him to have deposited the above amount vide cheque dated 11-09-2012, Exhibit 3.

**19.** For all these reasons, I do not find any merit in the Petition.

**20.** In the result, the Revision Petition is dismissed.

**21.** Consequently, order dated 09-12-2014 passed in Crl.M.Appl. No.78 of 2014 suspending the jail sentence imposed upon the Revisionist-Petitioner till the disposal of the Revision Petition stands superseded and the bail bond forfeited. It is needless to state that the period of imprisonment undergone by him both during the investigation and after the order of conviction shall stand remitted from the period of sentence passed against him vide judgment and order of the Learned Judicial Magistrate, South Sikkim at Namchi on 29-06-2013.

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**22.** The Revisionist-Petitioner is directed to appear before the Learned Judicial Magistrate, South Sikkim at Namchi on 09-09-2015 at 10.30 p.m. to face the process of execution of the sentence.

**23.** No order as to costs.

**24.** A copy of this judgment and the original case records be transmitted forthwith to the Leaned Judicial Magistrate, South Sikkim at Namchi for its due compliance.

**25.** A copy of this judgment and the original case records be also transmitted to the Court of the District & Sessions Judge, East Sikkim at Gangtok, for its record.

**( S. P. Wangdi )**  
**Judge**  
08-09-2015

Approved for reporting : **Yes**

Internet : **Yes**