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JIWAN DASS

v.

STATE OF HARYANA

FEBRUARY 26, 1999

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[G.B. PATTANAIK AND M.B. SHAH, JJ.]

*Criminal Law :*

*Penal Code, 1860 : Section 409.*

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*Criminal breach of trust—By public servant—Charge—Establishing of—Ingredients to be proved—Held : Prosecution must establish (i) Accused is a public servant (ii) is in such capacity entrusted with property or with dominion over it and (iii) he committed criminal breach of trust in respect of it—Strict proof must be given.*

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*Criminal breach of trust—By public servant—J and M, employees of Government Heat Treatment Centre, authorised to bring certain quantity of light diesel oil from Indian Oil Corporation (IOC)—For that purpose bank draft and authority letter given to J—But M took delivery of diesel oil and signed the cash memo as well as the register in token thereof—Oral evidence of Senior Technical Officer, Government Heat Treatment Centre and Depot Manager IOC confirmed that M took delivery of diesel oil—However, diesel oil was found to be deficient by 4300 litres—Subsequently, J gave an undertaking to make up the deficiency—Held: in view of said oral evidence there is no entrustment of diesel, or dominion over the same, to J—Handing over of*

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*bank draft and authority letter to J cannot lead to a contrary inference—Even the said undertaking by J cannot amount to confession or admission of guilt on the part of J—Hence, conviction of J under S. 409 not sustainable—However, in view of oral and documentary evidence, M is rightly held guilty of embezzlement of 4300 litres of diesel oil—Hence his conviction*

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*is upheld—Evidence Act, 1872, Ss. 17 and 24.*

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*Property—Entrustment of—Proof—Absence of legal and independent proof of entrustment—However, partial admission of entrustment obtained by putting a question with regard to entrustment—Held : Such partial admission not sufficient to prove entrustment—Rather, it is improper to even put such a question.*

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The appellants-accused were convicted by the Trial Court Section 409 of the Penal Code, 1860 and sentenced to undergo rigorous imprisonment for the three years. The Sessions Judge affirmed the conviction and sentence. The High Court dismissed the revision petition. Hence these appeals.

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According to the prosecution, J and M, employees of Government Heat Treatment Centre, were authorised to bring a certain quantity of light diesel oil from Indian Oil Corporation (IOC). For that purpose a bank draft and an authority letter were given to J which were deposited in the IOC office M took delivery of the diesel oil and in token there had not only signed on the cash memo but also on the register itself. Senior Technical Officer, Government Heat Treatment Centre and Depot Manager, IOC in their oral evidence, confirmed that M took delivery of the diesel oil. However, on actual measurement the diesel oil was found to be deficient by 4300 litres. Subsequently, J gave an undertaking that he would make up the deficiency.

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#### Disposing of the appeals, this Court

HELD : 1. To bring home a charge under Section 409 of the Penal Code, 1860, what is necessary to be proved is that the accused is a public servant and in such capacity he was entrusted with the property in question or with dominion over it and that he committed criminal breach of trust in respect of it. The prosecution must strictly prove the necessary elements constituted in the offence. It is true that prosecution need not prove the actual mode of misappropriation and once entrustment of or dominion over the property is established, then it would be for the accused to explain as to how the property was dealt with. [926-D-F]

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2. In view of the oral evidence of Senior Technical Officer, Government Heat Treatment Centre and Depot Manager, India Oil Corporation that M had taken delivery of the diesel oil it must be held that neither there was entrustment of diesel oil to J nor J had any dominion over the same. Mere fact that J was given the bank draft and authority letter to take delivery of diesel oil does not amount to entrustment of diesel oil to J or that he had dominion over the same. Even the subsequent undertaking given by J to make up the deficiency cannot amount to a confession or admission of guilt on the part of J. Hence, conviction of J under Section 409 IPC cannot be sustained. However, in view of oral and documentary

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A evidence M is rightly held to be guilty of embezzlement of 4300 litres of diesel oil. Therefore, his conviction under Section 409 IPC is upheld.

[928-B-F]

3. In a prosecution for offence of criminal breach of trust if there is absence of legal and independent evidence with regard to the entrustment,

B then it would be improper either to put a question with regard to the entrustment to the accused and if put and an answer is obtained, partially admitting entrustment, the same does not establish the case of entrustment. [928-G-H; 929-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.

C 990 of 1995 Etc.

From the Judgment and Order dated 22.3.93 of the Punjab & Haryana High Court in Crl. R. No. 245 of 1992.

D R.K. Jain, Rajeev Sharma, Rajni Narayan, Ranbir Yadav and Atul Kumar for the Appellants.

Ajay Siwach and Prem Malhotra for the Respondent.

The Judgment of the Court was delivered by

E PATTANAIK, J. Both these appeals are directed against the Judgment of a learned single judge of Punjab & Haryana High Court in Criminal Revision No. 245 of 1992. By the impugned judgment, the High Court has upheld the conviction and sentence against the two appellants under Section 409 of the Indian Penal Code for having committed criminal breach of trust in respect of 4300 litres of diesel oil.

G The prosecution case in nutshell is that both the accused persons were posted in the office of Government Heat Treatment Centre at Bahadurgarh and on 23.2.82, they were authorised to bring 10,000 litres of light diesel oil from the Indian Oil Corporation, Delhi. For that purpose the letter of authority as well as the bank draft to the tune of Rs.28,275.83 were given to them. The said two accused persons deposited the bank draft with Indian Oil Corporation and took delivery of 10,000 litres of light diesel oil but ultimately the quantity of diesel was found to be less by 4300 litres, the value of which was Rs.12,160/-.

H It is the prosecution case that both the accused persons committed the embezzlement of oil in question. The

prosecution examined as many as eight witnesses to establish the case against the accused persons. The accused persons also examined two defence witnesses. The learned Sub Divisional Judicial Magistrate, who tried this case by his judgment dated 25.7.91 came to hold that the prosecution has been able to establish the charges beyond reasonable doubt against both the accused persons and accordingly convicted them under Section 409 IPC and sentenced them to undergo rigorous imprisonment for three years and imposed a fine of Rs.3000/-, in default to further undergo imprisonment for three months. The accused persons preferred appeal before the Sessions Judge and the learned Sessions Judge affirmed the conviction and sentence passed by the learned Magistrate and dismissed the appeal. The matter was then carried to High Court in revision and the High Court by the impugned Judgment having dismissed the said revision, the present appeals have been preferred.

Mr. R.K. Jain, the learned Senior Counsel, appearing for accused Jiwan Dass, appellant in Criminal Appeal No. 990 of 1995, contended that the bank draft in question which was handed over to accused Jiwan Dass having been duly deposited with the Indian Oil Corporation and thereafter the diesel in question having been entrusted to accused Mittar Pal Yadav, and there being no entrustment of the said diesel to accused Jiwan Dass, which is the gravamen of the charge in the present case, the courts below committed error in convicting accused Jeewan Dass under Section 409 IPC. Mr. Jain also further contended that Jeewan Dass being a senior officer had been sent with the bank draft as the amount was a heavy amount. Any dereliction on his part in not himself taking delivery of the diesel but the diesel having been entrusted to accused Mittar Pal Yadav, Jiwan Dass might have been negligent in discharging official duty but that would not tantamount to commission of offence under Section 409 IPC and, therefore, the conviction and sentence passed against Jiwan Dass is liable to be set aside.

Mr. Ranbir Yadav, the learned counsel, appearing for Mittar Pal Yadav, on the other hand submitted that accused Mittar Pal Yadav was a junior officer and he acted at the behest of accused Jiwan Dass and in-fact signed the documents and the register without even verifying the contents thereof and, therefore, offence if any, was committed by Jiwan Dass and not by Mittar Pal Yadav.

A Mr. Ajay Siwach, the learned counsel, appearing for the State of Haryana on the other hand contended that both the accused persons having been sent with the money with the direction to bring diesel and both of them having proceeded, both of them are liable for the commission of offence and the courts below, therefore, were justified in convicting them under Section 409 IPC. The learned counsel also contended that Jiwan Dass being the person who was authorised to take delivery of diesel, cannot be exonerated of his liability even factually, delivery was taken by Mittar Pal Yadav inasmuch as in eye of law it must be held that entrustment was to Jiwan Dass. The learned counsel further contended that even if it is held that there has been no entrustment of diesel to Jiwan Dass but yet it must be held that Jiwan Dass held the dominion over the diesel and, therefore, he has committed an offence under Section 409 IPC for shortage of the diesel oil.

In view of the rival submissions, the question that arises for consideration is whether both the accused persons or any one of them committed the offence under Section 409 IPC. At the outset it must be stated that there was no charge under Section 34 and both the accused persons were charged under Section 409 IPC alone. To bring home a charge under Section 409, what is necessary to be proved is that the accused is a public servant and in such capacity he was entrusted with the property in question or with dominion over it and that he committed criminal breach of trust in respect of it. The necessary elements constituted in the offence must be strictly proved by the prosecution. It is true that prosecution need not prove the actual mode of misappropriation and once entrustment of or dominion over the property is established, then it would be for the accused to explain as to how the property was dealt with. In Exhibit PE, on the basis of which the Police registered the case and started investigation it was specifically mentioned that Jiwan Dass and Mittar Pal Yadav were authorised to take 10,000 litres of light diesel oil from Indian Oil Corporation and a bank draft amounting to Rs.28,275.83 had been given to Jiwan Dass, which draft he deposited. Thereafter they took delivery of 10,000 litres of light diesel oil but on actual measurement it was found to be less by 4300 litres. On an inquiry from Indian Oil Corporation, it was reported that delivery of 10,000 litres of diesel had been given and in token thereof Mittar Pal Yadav has put his signature. It was further stated in the said letter that Jiwan Dass on 2.3.82 gave a writing that he would make up the deficiency. On the basis of the aforesaid letter and after completion of

investigation, the Police filed Challan and the Magistrate took cognizance and charge that was framed on 26.3.84 was to the following effect: A

"That on 26.2.82 in the area of Bahadurgarh, you being a servant in the employment of Govt. Heat Treatment Centre, Bahadurgarh, as Superintendent and Store Keeper respectively and in such capacity entrusted with a bank draft of Rs.28,275.83 for purchase of 10,000 litres of high diesel oil and you committed criminal breach of trust in respect of 4300 litres of high diesel oil worth Rs. 12,158.60 and thereby committed an offence punishable under Section 409 of the IPC which is within the cognizance of this court." B

Thus the gravamen of the charge is commission of criminal breach of trust in respect of 4300 litres of diesel oil. That the bank draft in question was duly deposited with the office of the Indian Oil Corporation and there is no dispute over the same. The question that arises for consideration, therefore, is whether the diesel oil which was in fact found to be less by 4300 litres can be said to have been entrusted to Jiwan Dass or Jiwan Dass had any dominion over the same. It has been elicited from the evidence of PW-1, Senior Technical Officer at Bahadurgarh that accused Mittar Pal Yadav was authorised by the establishment to take delivery of oil from Shakurbasti Depot of Indian Oil Corporation and his attested signatures were in the office of the Indian Oil Corporation. The said witness in further cross examination also stated: C

"I have sent accused Mittar Pal Yadav because his signatures were there and he could take delivery." D

PW-4, the Depot Manager of the Indian Oil Corporation stated in his evidence: F

"I have seen the cash memo Exhibit PB, which bears my signature which was given to Mittar Pal Yadav, who had signed in my presence." G

In view of the aforesaid positive evidence, both oral and documentary, the conclusion is irresistible that delivery of diesel oil had been given to accused Mittar Pal Yadav, who in token thereof, had signed not only on the cash memo but also on the register itself. In the absence of any other material produced by the prosecution it is difficult for us to hold that either H

A there was any entrustment of the diesel to accused Jiwan Dass or he had any dominion over the same.

Mr. Ajay Siwach, the learned counsel appearing for the State of Haryana however very strenuously argued that Jiwan Dass being a senior officer and having been deputed with the bank draft for the purpose of taking delivery of the oil and the letter of authority being in favour of Jiwan Dass, it must be held that the entrustment of diesel had been made to Jiwan Dass or at least he had the dominion over the same. Mere fact that Jiwan Dass had taken the bank draft and that an authorisation had been given in his favour by his superior officers to take delivery of the diesel, cannot be the basis for coming to a conclusion that in fact the diesel had been entrusted to said accused Jiwan Dass or he had dominion over the same. When in point of fact it is established beyond reasonable doubt that delivery had been taken by accused Mittar Pal Yadav and in token of the same he had signed the relevant papers and register, Jiwan Dass being a senior officer may be responsible for dereliction of his duty in not taking delivery of the diesel himself. But on that score, it cannot be said that in fact the prosecution has been able to establish that diesel had been entrusted to Jiwan Dass and there has been shortage of the said diesel to the tune of 4300 litres. In our considered opinion the gravamen of the charge being misappropriation of 4300 litres of diesel oil which was found to be in shortage while measuring the diesel that had been brought and the said diesel having been delivered to Mittar Pal Yadav, who had signed the relevant documents in token thereof, the entrustment to or dominion over the diesel by Jiwan Dass has not been established and as such the prosecution has not been able to establish the charge under Section 409 IPC beyond reasonable doubt as against accused Jiwan Dass in respect of the shortage of diesel to the tune of 4300 litres. It is no doubt true that Jiwan Dass appears to have given in writing on 2.3.82 that he would be completing the quantity of 10,000 litres of oil but that writing neither can be held to be a confession or admission of the guilt on the part of the accused Jiwan Dass, nor that can form the basis of convicting the accused Jiwan Dass for an offence under Section 409 IPC. In a prosecution for offence of criminal breach of trust if there is absence of legal and independent evidence with regard to the entrustment, then it would be improper either to put a question with regard to the entrustment to the accused and if put and an answer is obtained, partially admitting entrustment, the same does not

establish the case of entrustment. In the aforesaid premises and in view of our conclusion that the prosecution has failed to establish entrustment of diesel to accused Jiwan Dass, the conviction of Jiwan Dass under Section 409 IPC cannot be sustained and we, accordingly set aside the conviction and sentence against the accused Jiwan Dass and acquit him of the charge levelled against and Criminal Appeal No. 990 of 1995 is accordingly allowed and his bail bonds stand discharged.

So far as accused Mittar Pal Yadav is concerned, as has been discussed earlier, there is conclusive oral and documentary evidence that it is he, who took delivery of 10,000 litres of diesel from the Depot of Indian Oil Corporation and the said diesel on actual measurement being found to be in short, no explanation has been offered by him except telling that he did so at the behest of the superior officer Jiwan Dass. In view of his signature available on several documents, indicating the fact that he took delivery of 10,000 litres of diesel, the explanation offered by the said accused Mittar Pal Yadav that he had signed being told by Jiwan Dass cannot be accepted and, therefore, the prosecution case about embezzlement of 4300 litres of diesel has been established beyond reasonable doubt against accused Mittar Pal Yadav. We, therefore, do not find any justification in interfering with the conviction and sentence passed against the accused Mittar Pal Yadav and consequently, Criminal Appeal No. 991 of 1995 stands dismissed. His bail bonds also stand cancelled and he must surrender to serve the balance period of sentence.

V.S.S.

Crl. A. No. 990/95 allowed.

Crl. A. No. 991/95 dismissed.