

**IN THE COURT OF THE SESSIONS JUDGE, KHURDA AT
BHUBANESWAR.**

Present:

Dr. D.P. Choudhury,
Sessions Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 10th Sept. '14.

Crl. Appeal No. 19 of 2012.

[Arising out of the judgment of conviction and sentence dated 16.04.2012 passed by Shri Janak Rout, learned J.M.F.C., Bhubaneswar in 1C.C. Case No.203 of 1995 (T.R. No.1398 of 2011)].

Uttam Sethy, aged about 72 years, Son of Late Madhab Sethy of Village - Mohanpur, P.S. - Aul, Dist. - Kendrapara, Ex-Branch Manager, Palalahara Sales Depot, Orissa Handloom Weavers Co-operative Society, Jawaharlal Nehru Marg, P.S. - Kharvela Nagar, Bhubaneswar, Dist. - Khurda.

... **Appellant.**

-V e r s u s-

Orissa State Handloom Weavers Co-operative Society, represented through its Secretary P.K. Mohanty, aged about 80 years, Son of Late Rajkishore Mohanty of At / P.O. - Jawaharlal Nehru Marg, P.S. - Kharvela Nagar, Bhubaneswar, Dist. - Khurda.

... **Respondent.**

Counsel :

For Appellant -- Shri H.B. Mangaraj & Associates.
For Respondent -- Shri B.P. Das & Associates.

Date of conclusion of argument : 09.09.2014.

Date of judgment : 10.09.2014.

J U D G M E N T

This appeal is directed against the judgment and order of conviction and sentence dated 16.04.2012 passed by the learned J.M.F.C., Bhubaneswar in 1C.C. Case No.203 of 1995 (T.R. No.1398 of 2011), convicting the appellant to undergo Rigorous Imprisonment for one year under section 406, IPC and Rigorous Imprisonment for two years and to pay a fine of Rs.5,000/-, in default of payment, to undergo Rigorous Imprisonment for a further period of four months under Section 408, IPC and the sentences are to run concurrently.

FACTS :

2. The case of the respondent, who is the complainant in the Court below, is that the appellant was the Branch Manager of the Sales Depot in charge of stock and cash of Pallahara Branch of Orissa State Handloom Weavers Co-operative Society Limited (hereinafter called "the Society"). The respondent is a Co-operative Society registered under Orissa Co-operative Society Act, 1962 ("the Act", for short). It is alleged, inter alia, that on 08.06.1962, Asst. Marketing

Officer M.M. Roy and Addl. Branch Manager Jagannath Das inspected the Pallahara Sales Depot and verified the stock as well as cash; but the appellant being the Branch Manager did not co-operate them because he had sold the stock on credit amounting to Rs.1.5 lakhs without any authority. The matter was brought to the knowledge of the Managing Director. He called the appellant on 09.06.1992 and the appellant assured him to regularize the stock / cash by paying Rs.80,000/- within a month and the balance amount on the next month. But, the appellant did not comply the same. On 07.01.1993, the officials of the Society went to the appellant's Branch for verification and, on that day also, the appellant neither co-operated nor showed the records with assurance that he would show the records on 08.01.1993. On 08.01.1993, the appellant remained absent. In the meantime, the Society took decision for special audit of the appellant's Branch and the same was held on 01.11.1993; but the appellant did not attend the said audit. On 20.11.1993, the Society came to know from the audit report that there was shortage of stock and cash amounting to Rs.7,40,342.44 p. for the year 1991-92 and 1992-93. The appellant was intimated about the audit report, but he did not regularize the shortage of stock and cash. Then, the respondent-Society lodged FIR on 12.01.1993 with police, but

no action was taken. The respondent also approached the concerned Superintendent of Police, but the same also went in vain. Thereafter, the respondent filed a complaint in the Court of S.D.J.M., Bhubaneswar, who took cognizance of the offences and issued process against the appellant. Hence the prosecution.

3. The plea of the appellant before the learned trial Court was squarely denial to the charge levelled against him. His plea, as revealed from his statement recorded under section 313 of the Cr. P.C. and cross-examination of P.Ws., is that there is no such shortage of any stock, as alleged against him at the relevant time; but, later on, fire broke out in the store causing damage to the stock.

4. The learned J.M.F.C., Bhubaneswar, to whom the case record was transferred, recorded the evidence of four witnesses from the side of the respondent and one witness from the side of the appellant. The learned trial Court went through the documents filed by the parties and on analysis of the evidence placed from both sides held the appellant guilty of the offences under sections 406 & 408 of the I.P.C. and sentenced him, as aforementioned.

CONTENTIONS :

5. Challenging the order of conviction and sentence

passed by the learned Court below, learned counsel appearing for the appellant submitted that the same is erroneous and contrary to law. The conviction is solely based on audit report, which does not stand in the eye of law and is thus liable to be set aside. He further submitted that the learned trial Court has erred in law by relying upon the audit report as it does not bear any conclusive character. He further submitted that the evidence of P.Ws. has not been properly appreciated by the learned trial Court. Learned counsel for the appellant also submitted that there was a Departmental Proceeding against the appellant, but the same was dropped as the allegations could not be proved and such fact should have been taken into consideration by the learned Court below while passing the order of conviction and sentence against the appellant. It was further submitted by him that when as per the story of the respondent the appellant had deposited the shortage amount, it proves that he has no criminal intention to misappropriate the Society money. Finally, learned counsel for the appellant submitted that the order of conviction being illegal should be set aside and the appellant be acquitted of the charges levelled against him.

6. Learned counsel appearing for the respondent submitted that there is lot of evidence on record to find out

the culpability of the appellant and the evidence adduced from the side of the respondent has been rightly assessed by the learned trial Court. He submitted that when huge amount of the Society has been misappropriated by the present appellant, the appeal preferred by him may be dismissed and the order of conviction and sentence passed by the learned Court below be confirmed.

DISCUSSIONS :

7. Since charge has been framed for the offences punishable under sections 406 & 408 of the I.P.C., the ingredients of the same are required to be proved by the respondent. The main points for consideration in this case are :

- (i) Whether the appellant being a clerk or servant of the Society was entrusted with certain property, or had dominion over the property, which was not of his own ?
- (ii) Whether the appellant has committed criminal breach of trust in respect of the said property ?

8. Keeping the above points in mind, let me turn to the evidence to examine the sustainability of the finding of guilt rendered by the Court below, which has been called in question in this appeal. It is revealed from the evidence of P.W.1 that during the incident, the appellant was the Branch Manager of Pallahara Sales Depot, Dhenkanal in the district of

Angul from 1984 to 1993. During his cross-examination, the same is not disputed. From the evidence of other witnesses, it is also available that the appellant was the Branch Manager of Pallahara Sales Depot under the Society. The appellant also does not challenge such fact, but the respondent has not filed a single document to show that the former was entrusted with any stock during the period 1991-1992 and 1992-1993. In its judgment, the learned trial Court is also silent as to what type of property was entrusted to the appellant. The respondent has not filed any document to show the duties and functions of the Branch Manager so as to know that the appellant had dominion over such property. Thus, the circumstantial evidence has to be taken into consideration.

9. It is revealed from the evidence of P.W.4 that in 1991, he had gone to enquire about shortage of stock; but, at the same time, it is revealed from his evidence that he has not verified the record at the Depot due to non-cooperation of the appellant. He has proved xerox copy of his report vide Ext.4 and also the seal of the Managing Director without spelling out that he is acquainted with the signature of that Managing Director, who has certified the same to be true copy. Thus, Ext.4 cannot be admissible in evidence. When he has not verified the record at the Depot and his report is not

admissible in evidence, his evidence cannot throw any light to show that the appellant was entrusted with the stock during 1991, 1992 & 1993 or had dominion over the same. P.W.2 stated to have made audit of the appellant's Branch under the Society during the period 01.04.1991 to 10.01.1993. He stated to have verified the Sale Register, Stock Register, Daily Cash Collection Register, invoice copies and Cash Book. But, not a single document has been filed by the respondent to prove that those documents were being maintained by the appellant in regular course of business and he had dominion over the stock and was in charge of cash and other sale-proceeds. The learned J.M.F.C. has formulated questions for determination and relied on the evidence of P.W.1 to show that the appellant was in charge of stock, store, accounts and overall supervision of the Depot during the relevant period. But, in cross-examination, P.W.1 has admitted that during the occurrence period, he was not the Secretary of the Society. It is further revealed from his evidence that whatever he states is based on record. But, no record is proved by him. Therefore, the evidence of P.W.1, as a whole, has not been gone through by the learned J.M.F.C. while coming to a conclusion that P.W.1 has proved that the appellant was in charge of Pallahara Sales Depot and he had dominion over the property. When the

evidence of a witness is assessed, it must be assessed by finding out his credibility and whether he is conversant with the facts in issue or not; but by mere reading of one sentence deposed by him in examination-in-chief, without going through the cross-examination, his evidence cannot be rightly evaluated. Be that as it may, the conclusion arrived at by the learned J.M.F.C. basing on examination-in-chief of P.W.1 that the appellant had dominion over the property is intelligible. P.Ws.1 to 4 have not whispered a single word as to what property was being dealt by the appellant and what was the manner of transaction between the Branch Office and the Head Office. Not even the Managing Director of the relevant period has come forward to depose and prove the entrustment of the property to the appellant or he had dominion over such property. So, on the whole, I find that the respondent has miserably failed to prove that the appellant being the Branch Manager of the Sales Depot was entrusted with stock, sale of property, maintenance of Cash Register, possession of sale-proceeds, submission of accounts to the Head Office, etc. On the other hand, one of the main ingredients of the offence for which the appellant has been charged falls short of proof. It is well settled law that if entrustment is proved, then onus is shifted to the accused to account for the stock. When

entrustment is not proved in the present case by the respondent, the onus still lies on him to prove that there was misappropriation of property or sale-proceeds thereof by the appellant.

10. In this case, the respondent has banked upon the evidence of P.W.4 and the audit report of P.W.2. On going through the evidence of P.W.1, it is found that during the relevant time, stock verification was conducted by P.W.4 and, during that period, the appellant was present but did not cooperate. According to him, stock verification is not an annual feature of the Society and they found shortage of stock, the value of which went to Rs.4,00,000/- to Rs.5,00,000/-. Again, he has stated that on being asked, the appellant told that he would deposit Rs.80,000/- within a month and he had given Rs.1,50,000/- stock on credit; but the appellant did not pay that amount. In cross-examination, he has stated that he was not the Secretary of the Society during the relevant period 1991-1992. He could not say the date of verification and he came to know about the verification of the Depot from their office record. Thus, P.W.1 has no personal knowledge about verification of the Depot by P.W.4. Now, let me go to the evidence of P.W.4. P.W.4 stated that he had gone to enquire about shortage of stock in the Depot where the appellant was

working. He submitted his report and placed certified xerox copy of the same vide Ext.4, which was objected by the appellant. He did not state that he is acquainted with the signature and handwriting of the Managing Director and also did not mention the name of the Managing Director, who has certified the same. Under the provisions of the Indian Evidence Act, a true copy can only be certified under the provisions of law and the person proving such document has to testify that he saw while the Managing Director signed or is acquainted with the handwriting and signature of such person who certified the same. Not only this, but also the person testifying the fact must prove that the original document is either missing or not available to satisfy section 65 of the Indian Evidence Act for adducing secondary evidence under section 63 of the said Act. In the absence of establishment of all these relevant factors, the xerox copy of the verification report of P.W.4 is not admissible in evidence. However, he has stated in cross-examination that due to non-cooperation of the appellant, he could not verify the records at the Depot. When he has not verified the records, it is not known as to how he came to the conclusion about shortage of stock. Again, he has stated that he has reported about shortage of stock upto Rs.4,00,000/- to Rs.5,00,000/- in that Depot and, at the same time, he has

admitted in para-4 of his cross-examination that there was fire in the said Depot and all the materials were destroyed in the said incident. When this fact is brought out in cross-examination, the evidence of P.W.4 should be clear as to when the Depot caught fire and when he made enquiry about shortage of stock. On the whole, the evidence of P.W.4 read with his report are not clear, cogent and above reproach to be relied upon to find out if during the period 1991-1992 and 1992-1993, there was shortage of stock caused by the appellant.

11. It is revealed from the evidence of P.W.2 that he being a Chartered Accountant was assigned the task of making special audit of Pallahara Sales Depot by the Society. He stated that the appellant was Branch-in-charge of that Depot. He conducted audit for the period 01.04.1991 to 10.01.1993 and he also made physical verification of the stock on 30.01.1993. After audit verification, he found shortage of Rs.7,40,342/-. In spite of necessary notice to the appellant, he did not attend the special audit. He proved his audit report vide Ext.2. But, in cross-examination at para-5, he could not say whether the appellant got notice about the special audit. When he is not aware whether the appellant had received notice about the special audit, it cannot be said that the

appellant remained absent wilfully during the time of audit despite due notice. At the same time, he confirmed that the Society had handed over all the records for verification and they have verified the same. But, unfortunately, not a single Register is placed by him before the Court below to show whether the short-fall in cash, cloth and other aspect was noticed by him. In further cross-examination, he could not say whether the Society collected deposits of the sale-proceeds of that Depot. On the other hand, he is not confirmed of the transactions between the Head Office and the Branch Office about collection of sale-proceeds. On going through his report, it appears that there was fire in the Depot on 11.01.1993, whereas physical verification of stock was made by him on 30.01.1993. At the same time, his report shows that he has made audit of stock, etc. upto 10.01.1993 and submitted his report on 20.11.1993. So, the report is obviously prepared knowing fully well that there was fire on 11.01.1993. When fire broke out on 11.01.1993 and audit was upto 10.01.1993, physical verification cannot be said to be fully proved and is based on only records available in the Depot. Further, it has been observed in the audit report that total shortage receivable and advance amount receivable from the appellant are subject to net off amounts payable by the Society towards

sales commission, salary, etc., which could not be ascertained due to non-availability of reconciled figure. On further verification of the audit report, it appears that only the Registers have been taken into consideration without physical verification of cash and stock. It is also found from the audit report that in some places there was shortage and in some other places there was excess of the amounts maintained. It is also revealed from the audit report that due to arithmetical calculation of physical verification report and charge list, the discrepancies are found. All these aspects have not been gone through by the learned Court below. On the other hand, the evidence of P.W.2 read with Ext.2 (Audit Report) are of an inconclusive character and cannot be the basis for showing the misappropriation of the amount, as alleged in the complaint case. The evidence of P.W.2 does not disclose that he has issued notice to the appellant seeking clarification to the objection raised by him. P.W.3, who is an employee of the Society, has stated that the Secretary of the Society has issued a notice to the appellant vide Ext.3. He has proved Ext.3. In Ext.3, it is found that a notice has been issued on 24.01.1994 just to show that there was shortage of cloth and cash of Rs.7,40,342.44 p. and also advance of Rs.2,55,146.45 p. lying unadjusted against him. He was also given a photo copy of the

audit report. In that report, they only asked to deposit the aforesaid amount and reconcile the accounts within a period of fifteen days. But, para-wise audit objection was not called for in that report. On the other hand, Ext.3 cannot be taken as objection of the audit report to be complied by the appellant; but it is a straight one to deposit the amount. Be that as it may, P.W.3 admitted that he has no knowledge about shortage of stock, except this letter vide Ext.3. When Ext.3 is only taken fixing liability without objection being brought to the knowledge of the appellant for compliance, no conviction can be maintained. In this connection, I rely upon the decision reported in **58 (1984) C.L.T. 80 (Okila Luha Vs. State of Orissa)**, where His Lordship has been pleased to observe at para-6 that :

“6. xx xx xx xx

No order of conviction can be based merely on the basis of an audit report of an inconclusive character as an auditor notes some objections therein and until the objections are brought to the notices of the persons concerned and the liability is fixed by the authorities after property enquiry, no legal culpability can be fixed.”

12. With due respect to the said decision, I find that in the instant case, the audit report being an inconclusive character, there being no objection brought with the knowledge of the appellant and fixing the liability without

complying with necessary pre-conditions, no legal culpability can be attached to the appellant.

13. The learned J.M.F.C. has relied upon the evidence of P.W.4 read with the deposition of the appellant while facing the Departmental Enquiry. P.W. 4 has proved the certified copy of the deposition made by the appellant in a Departmental Enquiry vide Ext.5. It is not revealed from the evidence of P.W.4 as to who has certified the deposition in such Departmental Enquiry and it is also not coming from the evidence of P.W.4 as to why the original of the same was not produced. Before taking into consideration Ext.5, it must be proved that it is admissible in evidence. Since pre-conditions of adducing secondary evidence are not established, such document cannot be made admissible in evidence. Apart from this, the certified copy of deposition of a witness before any Court or in judicial proceeding is admissible in evidence; but the certified copy of deposition in a Domestic Enquiry cannot be made relevant in a Court when deponent is not examined. Be that as it may, the learned Court below has not gone to this aspect and relied on this document to opine that the appellant has misappropriated the amount, as he has gone against the instructions of the Head Office to sell the cloth on credit. Selling of cloth on credit or not selling is not a matter here. He

has also relied upon this deposition to show that the appellant has admitted shortage of cloth. Even if it is not admissible, I went through the same; but it does not indicate that he has admitted misappropriation of any amount but made a grievance before the Authority that at the relevant time, he was ill. However, the conclusion of the learned J.M.F.C. that the respondent has well proved the factum of misappropriation by the appellant is not tenable.

14. On going through the entire case, it appears that the allegation has been made against the appellant due to shortage of cash, stock, etc. But, Their Lordships in the case of *Janeshwar Das Aggarwal Vs. State of U.P.* (AIR 1981 SC 1646) have been pleased to observe that :

“Where in a case though entrustment of certain articles in open godown was proved but there was no evidence, either direct or circumstantial, to show that the accused had misappropriated any of the articles in the godowns, the accused could not be presumed to have misappropriated the articles, merely on the ground that he failed to give any explanation for the shortage and his conviction would not be sustained”.

15. With due respect to the said decision, I find in the instant case, due to shortage of cash and stock, the appellant could not be presumed to have misappropriated the same merely because he has failed to give any explanation for the

shortage, for which his conviction cannot be maintained.

16. When the respondent has failed to prove the entrustment and misappropriation, which are two basic elements of the offences charged, it is not necessary to go through the evidence adduced from the side of the appellant. However, the appellant has exhibited Order No.66 dated 06.04.1998 issued by the Secretary of the Society to adjust the sales commission & bonus, T.A. Claims, interest on security deposit, and arrear salary of the appellant towards shortage remained unrecovered. Thus, it appears that the shortage of stock or cash has been directed to be recovered from the appellant. In that view of the matter, the respondent has not taken the shortage as misappropriation but as a shortage of accounts or miscalculation of accounts, for which the entitlement of the appellant has been ordered to be adjusted against the shortage. That apart, the appellant has also proved the certified copy of the FIR to show that there was fire in the Depot where he was working. This fact has been admitted by P.W.4.

17. D.W.1 has stated that there was fire broken out in the Depot due to electric short-circuit. But, in cross-examination, he could not say how the fire took place. He

insisted that he knew about the incident, for which he has come to the Court to depose. So, he has proved the fire incident in the godown. Thus, the appellant has proved by preponderance of probability that before the audit, there was an incident of fire in the Depot following which stock and Registers were burnt. On the other hand, he has successfully proved that the audit report is not correct to show misappropriation of any amount by him.

18. It has occurred during course of hearing that the place of occurrence is at Pallahara in the district of Angul. Ext.B shows that after the incident of fire in the Depot, the concerned OIC of Pallahara Police Station registered a case. The Final Report in that case having been submitted has been accepted by the learned S.D.J.M., Pallahara. It is not known how the complaint case of the same place of occurrence was filed here at Bhubaneswar and the matter was disposed of by the learned J.M.F.C., Bhubaneswar. It is also revealed from the complaint that FIR was lodged at Pallahara with regard to this case where police did not take any action; but surprisingly, complaint was filed before the learned S.D.J.M., Bhubaneswar, who took cognizance of the offence. Hence, viewed from judicial aspect, the proceeding also appears to be defective.

19. From the foregoing discussion, it appears that the

respondent has miserably failed to prove the ingredients of criminal breach of trust and, as such, the appellant cannot be held liable thereunder. The findings of the learned J.M.F.C. on this score is based on non-appreciation of evidence on record and without proper perspective and, as such, the same is not sustainable in law. Accordingly, the order of conviction and sentence passed by the learned J.M.F.C. is liable to be set aside. Hence ordered :

O R D E R

The appeal is allowed on contest. The judgment and order of conviction and sentence dated 16.04.2012 passed by the learned J.M.F.C., Bhubaneswar in 1C.C. Case No.203 of 1995 (T.R. No.1398 of 2011) is hereby set aside. The appellant be discharged from bail-bond.

**Sessions Judge, Khurda
at Bhubaneswar.**

10.09.2014.

Dictated, corrected by me and pronounced in the open Court this day the 10th September, 2014.

**Sessions Judge, Khurda
at Bhubaneswar.**

10.09.2014.

