

SUSHIL KUMAR GUPTA**A**

v.

JOY SHANKAR BHATTACHARYYA

February 23, 1970

[A. N. RAY AND I. D. DUA, JJ.]

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Criminal Trial—Secretary of co-operative society charged under ss. 408 and 477 A.I.P.C.—Joint trial with abettors—Acquittal of abettors—Effect on conviction of the principal accused.

Criminal breach of trust—User by accused of money entrusted, contrary to rules—Ratification by Directors—No power to ratify—Effect of

C

Misjoinder of charges—No prejudice to accused.

Constitution of India, 1950, Art 134(1)(c)—Certificate by High Court—Judicial discretion to be exercised by High Court.

The appellant, who was the Secretary of a Cooperative Society and was responsible for the cash and maintenance of the accounts of the Society, was charged with the offences of criminal breach of trust and falsification of accounts under ss. 408 and 477-A, I.P.C. He was tried along with 5 others who were charged with the offence of abetment of the offences. The trial court acquitted all of them, but the appellate court (the Court of Judicial Commissioner) convicted the appellant and acquitted the others. The appellate Court held that the appellant had advanced money against the rules of the Society and also to various persons not entitled to it, that the appellant had thereby committed criminal breach of trust and either misappropriated or misapplied the funds of the Society dishonestly to benefit himself or his relations and friends. The appellate Court certified that the case was a fit one for appeal to this Court under Art. 134(1)(c), but, the order granting the certificate did not disclose on its face what exactly was the difficulty of the appellate Court and what question of outstanding difficulty this Court was to settle.

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In appeal to this Court,

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HELD : (1) The acquittal of the co-accused was not based on the finding that there was no falsification of accounts or embezzlement. Therefore, the appellant could not contend that no offence was committed because of the acquittal of the co-accused. [773 G-D]

(2) On the finding of the appellate court, it was not a mere civil liability of the appellant. The appellant's manner of dealing with the money entrusted to his custody constituted criminal breach of trust. The Directors had no authority under the bye-laws to give any directions contrary to the bye-laws and so, could not ratify the violation of the bye-laws. Any resolution ratifying the use of trust money contrary to the directions contained in the bye-laws would not validate the breach of the bye-laws. [775G; 776 A-C]

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(3) There was no misjoinder of charges and no prejudice was caused to the appellant. [776 F]

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(4) The appellate Court should not have granted the certificate under Art. 134(1)(c) in the present case. The word 'certify' in the Article

- A postulates the exercise of judicial discretion by the appellate Court and the certificate should ordinarily show on the face of it that the discretion was invoked and properly exercised. This Court should be in a position to know that the appellate Court has not acted mechanically but has applied its mind. A certificate under this clause is impermissible on questions of fact. When the case does not disclose a substantial question of law or principle the certificate granted by the appellate Court is liable to be revoked by this Court, though such *prima facie* non-disclosure would not by itself automatically invalidate the certificate. [777 A-C]
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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 131 of 1967.

- C Appeal from the judgment and order dated January 9, 1967 of the Judicial Commissioner's Court Tripura, Agartala in Criminal Appeal Case No. 8 of 1963.

M. K. Ramamurthi, J. Ramamurthi and Vineet Kumar, for the appellant.

H. R. Khanna and R. N. Sachthey, for the respondent.

- D The Judgment of the Court was delivered by

Dua, J. Pursuant to a complaint by Shri Joy Shanker Bhattacharyya, the appellant Sushil Kumar Gupta was tried in the court of Assistant Sessions Judge, Tripura on the following charges :

- E “(1) That you in between the month of September, 1958 and July, 1959 at Agartala P. S. Kotwali being a servant viz. Secretary in the employment of the Tripura Central Marketing Co-operative Society Ltd., and in such capacity entrusted with certain property to wit a total sum of Rs. 18,200 being the fund of the Society committed criminal breach of trust in respect
- F of the said property and thereby committed an offence punishable under s. 408 of the Indian Penal Code and within the cognizance of this Court.

- G Secondly : that you in between the period of September, 1958 and July, 1959 at the same place being a Secretary in the employment of the Tripura Central Marketing Co-operative Society Ltd., wilfully and with intent to defraud, falsified certain books and other relevant papers to wit cash book etc., which belonged to the said society, your employer and thereby committed an offence punishable under s. 477-A of the Indian Penal Code and within the cognizance of this Court.”

- H As the appellant was tried jointly along with five others who have been acquitted and as it was argued on behalf of the appellant that in view of the acquittal of his co-accused the appellant

also should have been acquitted, the charges against them may also be reproduced : A

“That Sushil Kumar Gupta, Secretary of the Tripura Central Marketing Co-operative Society Ltd., in between the period of September, 1958 and July, 1959 at Agartala p.s. Kotwali committed the offence of criminal breach of trust in respect of Rs. 18,200 and that you the aforesaid persons at the same place and time abetted the said Shri Sushil Kumar Gupta in the commission of the same offence of criminal breach of trust in respect of the said amount which was committed in consequence of your abetment and that you have thereby committed an offence punishable under s. 109, I.P.C. read with s. 408, I.P.C. and within my cognizance. B

Secondly : that Shri Sushil Kumar Gupta, Secretary of the Tripura Central Marketing Co-operative Society Ltd. in between the period of September, 1958 and July, 1959 at Agartala p.s. Kotwali committed the offence of falsification of accounts and that you the aforesaid persons at the same place and time abetted the said Shri Sushil Kumar Gupta in the commission of the same offence of falsification of account which was committed in consequence of your abetment and that you have thereby committed an offence punishable u/s 109, I.P.C. read with s. 477-A of the I.P.C. and within my cognizance.” C

The trial court acquitted all the six accused persons. An appeal against the acquittal of all of them was preferred under s. 417 (3), Cr. P.C. in the court of the Judicial Commissioner, Tripura. That court allowed the appeal against S. K. Gupta only and dismissed it as against the others. S. K. Gupta was held guilty of the offence of criminal breach of trust under s. 408, I.P.C. and also of the offence of falsification of accounts under s. 477-A, I.P.C. regarding the sum of Rs. 18,200. He was sentenced under each count to undergo rigorous imprisonment for one year, the sentences to be concurrent. D

The convict S. K. Gupta has appealed to this Court on certificate granted under Art. 134(1)(c) of the Constitution. The order granting the certificate does not disclose on its face what exactly the difficulty of the court of the Judicial Commissioner is and precisely what question of outstanding difficulty this Court is desired to settle. On behalf of the appellant his learned advocate Shri Ramamurthy, however, addressed elaborate arguments questioning the order of the learned Judicial Commissioner allowing E

- A** the appeal against the appellant S. K. Gupta's acquittal. His challenge was based on three main contentions. The fourth point that the learned Judicial Commissioner erred in law in considering Ex. P-59 to be admissible in evidence, in disagreement with the trial court, according to which it was hit by s. 24, Indian Evidence Act, was not allowed to be argued in this Court because
- B** this ground was not taken in the grounds of appeal.

- The first contention seriously pressed on behalf of the appellant is that in view of the acquittal of his co-accused who were tried along with him the court of the Judicial Commissioner was wrong in law in holding that there was falsification of accounts and embezzlement of the funds of the Tripura Central Marketing
- C** Co-operative Society. This submission is unacceptable. The acquittal of the other co-accused as affirmed by the learned Judicial Commissioner is not based on the finding that there was no falsification of accounts and no embezzlement of the funds of the Society. S. K. Gupta, appellant, it may be pointed out was the Secretary of the Society since April 13, 1957 when the first general
- D** meeting of the Society was held and was in that capacity entrusted with its funds. He worked as such till August 10, 1960. He was accordingly responsible for the cash and maintenance of current accounts of the Society during the period in question. Turning to the Bye-laws of the Society, bye-law no. 41 prescribes the duties of the Secretary. According to this bye-law the Secretary has *inter alia* :

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- “(3) To make disbursement and to obtain vouchers and to receive payments and pass receipts, under the general or special orders of the Board of Directors on this behalf from time to time.

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- (4) To keep all accounts and registers required by the rules.

- (13) To countersign cash book in token of the balance being correct and to produce the cash balance whenever called upon to do so by the Chairman or any person authorised to do so.
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In the absence of the Secretary the Board of Directors may authorise the Manager to perform the duties of the Secretary.

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- The Board of Directors may also authorise the Manager to perform any of the duties of the Secretary to facilitate the working of the Society.

Receipts passed on behalf of the Society shall be signed by the Secretary. Share certificates and other-

documents shall be signed by the Secretary and one member of Board of Directors jointly.”

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Byelaw 42 contains directions regarding advances against produce of goods and clause (1) of this byelaw provides :

“(1) The Board of Directors shall, at the beginning of the session, fix the amount of advance, indicating the percentage of the market price of produce or goods pledged with the society, that may be granted to a member. Such limits may be fixed for different commodities and varied from time to time according to fluctuation in markets or otherwise.”

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It shall also be competent for the Board of Directors to call on a borrower at any time before the due date to repay a portion of the loan or advance issued or to produce additional security for the outstanding loan or advance within a time fixed by them, if in their opinion, there is fall or likely to be a fall in the market value of the produce or goods pledged.”

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Under byelaw 44 loans may be granted to members in suitable cases on such terms and conditions as regards individual and maximum limits, repayment of loan, rate of interest thereon etc., as may be fixed by the Board of Directors from time to time. According to the learned judicial Commissioner “the overall picture” emerging from the evidence on the record, to quote his own words, it :

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“(1) A sum of Rs. 18,200/- was said to have been disbursed in 1958 and 1959.

(2) It was said to have been repaid in the last week of June, 1959 towards the end of the co-operative year of 1959 and long after the maximum period of 6 months allowed by rule 42 (4) of the byelaws.

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(3) The same amount was again said to have been disbursed in a few days in the first week of July commencing with the next cooperative year (1959-60).

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(4) Except the 2nd and 4th respondents, the others were not members of the Co-operative Society and in this regard the 1st respondent disregarded sub-rule (1) of r. 42 of the byelaws.

(5) The 1st respondent did not obtain any general or special orders of the Board of Directors to make the disbursements and violated sub-rule (1) of r. 42 of Ext. P-41.

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(6) Ext. P-56 and P-59 show that the alleged collections of the monies in June 1959 was false and that the accounts were got up.

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(7) The fact that a discount of Rs. 10/- was paid to cash a cheque on 29-6-1959 shows that the society had no funds on that day.

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(8) None of the alleged loanees was a Jute grower and no jute was deposited in the godowns of the society before the advances were made and in this regard the mandatory provisions of sub-r. (2) of r. 42 were also disregarded by the 1st respondent.

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(9) A number of adjustments were made in the Accounts to show that the sum of Rs. 18,200/- was disbursed.

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(10) The three persons to whom ultimately the amounts were said to have been disbursed are interested in the 1st respondent. The 4th respondent C. C. Das Gupta is a relation of the 1st respondent and proved by P. Ws 1, 6 and 8 and as admitted by the 4th respondent himself in Ext. P-56. The 3rd respondent Sudhir Ranjan Roy is a servant of D.W. 1 who is a co-Director of the Match Factory and friend of the 1st respondent. The 3rd respondent Haradhan Deb was appointed by the 1st respondent in the C.M.S. The 3rd respondent was also an employee of the C.T.S. of which the 1st respondent was a Director."

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On the basis of these observations the appellant was held to have committed criminal breach of trust and to have either misappropriated or misapplied the funds of the Society dishonestly to benefit himself of his relations and friends. Counsel failed to point out any legal infirmity in the final conclusion drawn in the impugned order from the overall picture. Indeed, counsel, after a faint attempt to find fault with this conclusion felt constrained to admit that the money had been advanced against the rules of the Society and also to the persons not entitled to it, his only contention in support of the appeal being that it did not constitute a criminal offence and that in any event the Board of Directors of the Society having ratified the advances, the foundation for the criminal charge must be deemed to have disappeared. We are unable to agree.

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The offence of criminal breach of trust is committed when a person who is entrusted in any manner with property or with dominion over it, dishonestly misappropriates it, or converts it to his own use, or dishonestly uses it or disposes it of, in violation

of any direction of law prescribing the mode in which the trust is to be discharged, or of any lawful contract, express or implied, made by him touching such discharge, or wilfully suffers any other person so to do. The appellant's manner of dealing with the money entrusted to his custody clearly constitutes criminal breach of trust. Counsel was not able to point out any provision which empowers the Directors to prescribe the mode of making advances, which violates or is in breach of, or contrary to the Byelaws. If the Directors possess no authority to give any directions contrary to the byelaws they can scarcely claim or assume power to ratify violation of the Byelaws in the matter of dealing with the trust money. Our attention was not drawn to any over-riding provision conferring power on the Board of Directors to ratify use of the trust money contrary to the directions contained in the Byelaws. Exhibit P-27, the resolution of the Board of Directors dated January 10, 1960, on which reliance in support of the argument was placed, merely states "investments made by the Secretary uptodate are hereby approved" without pointing out the provisions under which such approval could validate breaches of the Byelaws. Incidentally it may be mentioned that the learned Judicial Commissioner also entertained some suspicion about the manner in which the meeting, in which this resolution was passed, was held. This contention of the counsel must, therefore, be repelled.

In the last submission the counsel made a grievance against the joint trial of several accused persons on several items of embezzlement. According to him there was a misjoinder of charges which vitiated the trial. In our opinion, charges under s. 408 and s. 477-A, Indian Penal Code, could, in the circumstances of this case, be tried together and the joint trial of all the accused was proper and lawful. Our attention was not drawn to any provision of law against the legality of the joint trial. In any event no failure of justice in consequence of the joinder of charges was pointed out, with the result that the question of misjoinder of charges must be held to be of little consequence at the stage of appeal.

Before closing we may point out, as has repeatedly been said by this Court, that there is normally no right of appeal to this Court in criminal matters except in cases provided by Art. 134 (1)(a) and (b) of the Constitution. Clause (c) of this Article empowers the High Court to certify cases to be fit for appeal to this Court. The word "certify" is a strong word; it postulates exercise of judicial discretion by the High Court and the certificate should ordinarily show on the face of it that the discretion was invoked and properly exercised. This Court should be in a position to know that the High Court has not acted mechanically

- A** but has applied its mind. A certificate under this clause is impermissible on questions of fact and when a case does not disclose a substantial question of law or principle then the certificate granted by the High Court is liable to be revoked by this Court, though such *prima facie* non-disclosure would not by itself automatically invalidate the certificate. In the case in hand no substantial question of law or principle was made out at the bar and the certificate was clearly misconceived though it vaguely states that several questions of law are involved. The appeal fails and is dismissed.
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V.P.S.

Appeal dismissed.