FULL BENCH

Before K. S. Tiwana, S. S. Dewan and M. M. Punchhi, JJ.

STATE OF PUNJAB,—*Appellant*

versus

KESARI CHAND AND ANOTHER,—*Respondents.*

Criminal Appeal No. 618-DBA of 1983.

January 13, 1987.

Indian Penal Code (XLV of 1860)—Sections 7, 21 Clause Twelfth (b), and 409—Punjab Cooperative Societies Act (XXV of 1961)—Section 30—President and Secretary of a Cooperative Society charged with criminal breach of trust under Section 409 of the Code—Cooperative Society—Whether can be said to be a Corporation established by or under a State Act—Office bearers aforesaid—Whether can be said to be public servants within the meaning of clause Twelfth (b) of Section 21 of the Code so as to attract the provisions of Section 409 of the Code.

Held, that in the context of clause Twelfth (b) of Section 21 read with Section 7 of the Indian Penal Code, 1860, the expression 'corporation' is to be given a narrow legal connotation. The explanation of the expression public servant can by no means be extensive and it has to confine to that language and nothing extensively can be added to it. Moreover, the members who compose the corporation are quite different from the corporation itself for a corporation is a legal person just as much as an individual. Thus it is a group of individuals who first associate on their own volition to become a cooperative society and then seek the status as a body corporate as would be evident from the language of Section 30 of the Punjab Cooperative Societies Act, 1961. The body of individuals who form a cooperative society do not owe their existence to a corporation established by or under a State Act but owe their corporate status of their seeking to the Act. Thus, the President and the Secretary of the Cooperative Society are not public servants within the meaning of clause Twelfth (b) of Section 21 of the Code because the Cooperative Society is not a corporation established by a State Act in whose service or pay they are assumed to be and as such the provisions of Section 409 of the Code are not attracted to the case. (Para 13)

(This case was referred to Larger Bench by the Division Bench consisting of Hon'ble Mr. Justice M. R. Sharma, and Hon'ble Mr. Justice Surinder Singh, J. on September 16, 1983 for the decision of an important question of Law involved in the case. The Larger Bench consisting of Hon'ble Mr. Justice K. S. Tiwana, Hon'ble Mr. Justice S. S. Dewan, Hon'ble Mr. Justice M. M. Punchhi finally decided the case on 13th January, 1987).

Appeal from the order of the Court of Shri Dalbara Singh, P.C.S., Judicial Magistrate, 1st Class, Bhatinda dated 23rd December, 1983 acquitting both the accused.

H. S. Riar, D.A.G., Punjab, *for the Appellant.*

G. S. Bawa, Advocate and Parminder Singh, Advocate, *for the Respondent.*

JUDGMENT

M. M. Punchhi, J.:

(1) This appeal against acquittal has been placed before this Full Bench in the following circumstances :—

Talwandi Sabo Co-operative Agricultural Service Society, Limited, Talwandi Sabo, district Bhatinda, is a registered society under the provisions of the Punjab Co-operative Societies Act, 1961. There was an embezzlement in the tune of Rs. 1,22,116.50 as reported to the Assistant Registrar, Co-operative Societies, by an Inquiry Officer appointed for the purpose. It was detected that the embezzlement had been committed by showing bogus loans to have been advanced to some members, showing securities to have been returned to members fictitiously and by recovery of loans from certain members without showing their entries in the account-books of the society. Additional embezzlement had also been committed in relation to sale of sugar which had not been accounted for in the books, etc., etc. The Assistant Registrar thus on 25th September, 1970 sent a letter to the Superintendent of Police, Bhatinda, whereupon a case under section 408, Indian Penal Code, was registered and after investigation the two respondents Kesri Chand, the Secretary of the Society, and Surrinder Singh, the President thereof, were sent up for trial before a Judicial Magistrate, 1st Class, Bhatinda. The challan was put in as late as on 29th April, 1980.

(2) Charge was framed under section 409, Indian Penal Code, against the accused-respondents. The prosecution examined as many as 44 witnesses. Finally on 23rd December, 1983, Shri Dalbara Singh, Judicial Magistrate, Ist Class, Bhatinda, acquitted the accused-respondents taking the view that section 406, Indian Penal Code, was at best attracted to the facts of the case, and as the matter had remained under investigation since the year

1970 and challan had not been put in within three years, as prescribed under section 468(2)(c) of the Code of Criminal Procedure, the prosecution was barred by limitation. Strength on the question of limitation was sought from the judgment of the Supreme Court reported in *State of Punjab* v. *Sarwan Singh*, 1982, Chandigarh Law Reporter 68. Since the learned Magistrate was mainly basing his judgment of acquittal on this factor, he in a most casual manner disposed of the prosecution case in one paragraph reproduced hereafter :

"7. At the very outset I find that the galaxy of 44 witnesses of the prosecution have not been able to illuminate and substantiate the case of the prosecution as none of them has proved the entrustment of money in the hands of the two accused. PW-3 Amritpal Singh has stated that in the year 1968 when the accused Kesri Dass was the Secretary of the Society, he had taken the amount of Rs. 3 lacs from Raman Co-operative Bank and he handed over the amount to Kesri Dass. Further he has stated that the entry in the cash book was also made with regard to that amount. The copy of Rokar Bahi, Exhibit PW-3/A which he has proved and the said amount is shown to have been deposited against the entry No. 62 on 27th January, 1969. Further he has deposed that the cashier of the Bank was Dan Chand and it was not necessary for the Cashier to bring the amout from the Bank and to deposit the same. Further he has stated that the Society could authorise anybody by passing the resolution but there is no resolution placed on the file authorising Kesri Chand, Secretary to handle the amount. So much so, there is no resolution or letter as regards the appointment of Kesri Dass as Secretary and his functions to be performed. In the present case the prosecution should have established on the file that Kesri Chand was appointed as Secretary and he was entrusted with the duty of bringing the amount and to distribute the amount on behalf of the Society to the loanees, and to receive the loan amount. There is no such evidence on the record that Kesri Chand accused was so appointed by the Society, P.Ws. have deposed that they did not take any loan from the society and also they did not execute the pronote or Tomasak in favour of the Society for any

amount have not proved that the pronote and receipt were forged one. The prosecution has also not cared to establish that the pronote were forged by producing cogent evidence with regard to the identification of the signatures or the thumb impressions of the witnesses on the pronote."

(3) The State of Punjab filed the present appeal against acquittal which came up before a Motion Bench consisting of M. R. Sharma and Surinder Singh, JJ., who at the motion stage referred it to a Full Bench in order to question the view of an Hon'ble Single Judge of this Court expressed in *Gurmit Singh and another* v. *The State of Punjab* (1), wherein it was held that the office-bearers of the co-operative society are not public servants within the meaning of section 21 of the Indian Penal Code and on that basis, the accused in that case were not permitted to be proceeded against under section 5(2) of the Prevention of Corruption Act, 1947. It is pursuant to that order that the case as such has been placed before this Bench.

(4) Before we deal with other aspects of the case, it would be expedient to intially determine the primary question as to whether the respondents, who are statedly the President and Secretary of the registered co-operative society, are public servants within the meaning of section 21 of the Indian Penal Code, as the answer to that question would determine the fate of the head of charge.

(5) Chapter II of the Indian Penal Code bears the title "General Explanations". Section 7 says :

"*Sense of expression once explained.*—Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation."

Section 21 in so far as it is relevant for the present purpose is extracted below :—

" 'Public servant'.—The words 'public servant' denote a person falling under any of the description hereinafter

(1) 1977 C.L.R. (Pb. and Hry.) 53.

following, namely:—

* * * *

Twelfth.—Every person—

(a) * * *

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Now whether the respondents could be termed under clause (b) to be in the service or pay of a corporation established by or under a State Act ? In other words, whether the co-operative society, in whose service or pay are statedly the respondents, is a corporation established by or under the Punjab Co-operative Societies Act, 1961 so as to denote them public servants within the meaning of section 21 of the Indian Penal Code and sequeally attracting section 409, Indian Penal Code, in the event of the respondents being found guilty of criminal breach of trust ?

(6) There are two currents which permeate the judicial thought on the subject; one which is designedly specific and the other widely constitutional. The former is reflective in *S. S. Dhanoa* v. *Municipal Corporation, Delhi* (2), *and others,* and the latter in *Daman Singh and others* v. *State of Punjab and others,* (3). It requires discerning which should apply in the instant case and what rules of interpretation need apply to the provision in hand, i.e. section 21, Indian Penal Code.

(7) As pointed out in Craies on Statute Law, Seventh Edition, page 213, where an interpretation clause defines a word to mean a

(2) A.I.R. 1981, S.C. 1395.

(3) A.I.R. 1985 S.C. 973.

particular thing, the definition is explanatory and *prima facie* restrictive; and whenever an interpretation clause defines a term to include something, the definition is extensive. While an explanatory and restrictive definition confines the meaning of the word defined to what is stated in the interpretation clause, so that wherever the word defined is used in the particular statute in which that interpretation clause occurs, it will bear only that meaning unless where, as is usually provided, the subject or context otherwise requires, an extensive definition expands or extends the meaning of the word defined to include within it what would otherwise not have been comprehended in it when the word defined is used in its ordinary sense.

(8) Section 7 of the Indian Penal Code is obviously restrictive in language. The explanation of the expression 'public servant' can thus by no means be extensive, it has to confine to that language and nothing extensively can be added to it. The Court would refrain from introducing in it something which is not there; more so in the context in which the question has arisen.

(9) In *S. S. Dhanoa's case* (supra), the question arose almost directly but in unison with section 197, Criminal Procedure Code, and not exclusively confined to the provisions of the Indian Penal Code. The facts in that case were that the cooperative store over which Dhanoa was the General Manager, sent on deputation by the Government, was a society registered under the Bombay Co-operative Societies Act, 1925. He along with other officials of the co-operative store was prosecuted under the Prevention of Food Adulteration Act, 1954. He raised a preliminary objection before the Court summoning him taking shelter of want of sanction under section 197, Criminal Procedure Code. He failed in the lower hierarchy of Courts and finally knocked the door of the Supreme Court. The question there centred round as to whether while on deputation with the co-operative society as its General Manager was he a 'public servant' within the meaning of section 21 of the Indian Penal Code. The Supreme Court pointed out that clause twelfth did not use the words 'body corporate' and, therefore, the specific expression 'corporation' used therein taken in collocation of the words "established by or under a Central, Provincial or State Act" won't bring within its sweep a co-operative society. The Court said it in so many words ruling as follows as is evident from page

1398 of the Report :—

> "In our opinion, the expression 'corporation' must, in the context, mean corporation created by the Legislature and not a body or society brought into existence by an act of a group of individuals. A co-operative society is, therefore, not a corporation established by or under an Act or the Central or State Legislature."

The Court further went on to observe that a corporation established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status to the Act, and that an association of persons, constituting themselves into a company under the Companies Act or the society under the Societies Registration Act, owes its existence not to the Act of Legislature but to acts of parties, through it may owe its status as a body corporate to an Act of Legislature. It is crystal clear that the Court in *S. S. Dhanoa's case* (supra) was not called upon to decide and did not decide whether a co-operative society being a body corporate was an instrumentality or agency of the State for the purposes of Parts III and IV of the Constitution or to be the 'State' within the meaning of that expression used in Article 12 of the Constitution.

(10) *In Daman Singh's case* (supra), a larger Bench of the Supreme Court in the context of Article 31A(1)(c) and Schedule VII, List I, entry 43 and List II, entry 32, of the Constitution was called upon to determine as to whether there was violation or abridgement of any of the rights of the members conferred by Articles 14 and 19 of the Constitution constituting a co-operative society, which was a body corporate under section 30 of the Punjab Co-operative Societies Act, in the event of its amalgamation with another co-operative society. Their Lordships repelling the contention observed that the expression 'Corporations' occurring in Article 31A(1)(c) had to be given a broader interpretation since there could be no higher interest than the public interest avowedly being served under that Article. The Court had in that event then ruled as follows :—

> "We have already extracted section 30 of the Punjab Act which confers on every registered co-operative society the status of a body corporate having perpetual succession and a common seal, with power to hold property,

enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted. There cannot, therefore, be the slightest doubt that a co-operative society is a corporation as commonly understood. Does the scheme of the Constitution make any difference? We apprehend not."

It is in this context that the Court expressed the view that the Parliament apparently chose a broader expression 'corporaion' not with a view to limit the protection of the legislation relating to amalgamation to any class of corporations but with a view to protect legislation pertaining to amalgamation to all classes of Corporations. In this view they repelled the contention of the members of the co-operative societies regarding which amalgamation orders had been passed. It is in this light, which would have advanced the constitutional mandate, that their Lordships of the Supreme Court, seemingly in the wider sense, observed as follows :—

"In the cases before us we are concerned with co-operative societies which from the inception are governed by statute. They are created by statute, they are controlled by statute and so there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association."

(11) The learned Deputy Advocate-General, Punjab, clung to the words "they are created by statute, they are controlled by statute" occurring in *Daman Singh's case* (supra) to vehemently contend that a co-operative society is a corporation under section 21 of the Indian Penal Code and also for the weight of its being a decision of five Hon'ble Judges. Learned counsel for the respondents clung to the words "it is not a statutory body because it is not created by a statute. It is a body created by an Act of a group of individuals in accordance with the provisions of a statute" on the strength of *S. S. Dhanoa's case* (supra) and urged that this case was more to the point being restricted and specific to the issue.

(12) The Supreme Court, however, in a later case in *Central Inland Water Transport Corporation Ltd. and another* v. *Brojo*

Nath Ganguly and another, (4), took stock of *S. S. Dhanoa's case* (supra) and observed as follows :—

> "At the first blush it may appear that the case of *S. S. Dhanoa v. Municipal Corporation, Delhi,* (5), runs counter to the trend set in the authorities cited above but on a closer scrutiny it turns out not to be so."

Their Lordships then quoted assentingly an extract from *S. S. Dhanoa's case* :—

> "In our opinion, the expression 'corporation' must, in the context, mean a corporation created by the legislature and not a body or society brought into existence by an act of a group of individuals. A co-operative society is, therefore, not a corporation established by or under an Act of the Central or State legislature."

(13) It is explicit from *Dhanoa's case* (supra)) that in the context of clause twelfth of section 21 of the Indian Penal Code, the expression 'corporation' was given, in so many words, a narrow legal connotation but in *Daman Singh's case* (supra), a context which was different from that of the Penal Code, a liberal interpretation was given to the expression 'corporations' occurring in Article 31A(1)(c) of the Constitution so as to include co-operative societies created and controlled by a statute. It has been noticed many a times that the members who compose the corporation are quite different from the corporation itself; for a corporation is a legal person just as much as an individual. Thus, it is a group of individuals who first associate on their own volition to become a co-operative society and then seek a status as a body corporate under the Co-operative Societies Act. This would be evident from the language of section 30 of the Punjab Co-operative Societies Act. So the body of individuals, which form a co-operative society, do not owe their existence to a corporation established by or under a State Act but only owe their corporate status of their seeking to the Act. It seems to us that the Supreme Court in *Daman Singh's case* (supra), when observing that the Society was created by a statute meant that its corporate status had been created by a

(4) A.I.R. 1986 S.C. 1571.

(5) (1981) 3 S.C.C. 431 (A.I.R. 1981 S.C. 1395).

statute. Equally, when in *S. S. Dhanoa's case* (supra), the Court had observed that the society was not created by a statute had in mind that mere incorporation under a statute was not its getting created, as in the backdrop there stood a body already created by an act of a group of individuals. Thus on closer analysis, we are of the considered view that the President and the Secretary of the Co-operative Society are not 'public servants' within the meaning of clause twelfth (b) of section 21 of the Indian Penal Code, and to whom the provisions of section 409, Indan Penal Code, are not attracted, because the co-operative society is not a 'corporation' established by a State Act in whose service or pay they supposedly are, or are assumed to be.

(14) A simple criminal breach of trust is punishable under section 406, Indian Penal Code, but a criminal breach of trust by a clerk or servant is punishable under section 408, Indian Penal Code, to a term of imprisonment which may extend to seven years. The provision is as follows :—

> "408. CRIMINAL BREACH OF TRUST BY CLERK OR SERVANT:—
>
> Whoever being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

If section 408, Indian Penal Code, is attracted, then the bar of limitation would vanish. There is ample prosecution evidence containing the allegations that the respondents were the President and the Secretary of the society and were thus serving the society in that capacity. There is ample prosecution evidence containing the allegations that the respondents had been entrusted with the monies and affairs of the society and had otherwise dominion over the monies and properties of the society. If need be reference can be had to the evidence of P.W. 3 Amrit Pal, P.W. 35 Jarnail Singh, P.W. 36 Dhan Chand, Cashier, and P.W. 37 Harnam Singh. The nature of the duties of the respondents clearly brought them within the mischief of section 408, Indian Penal Code, and this view

of ours derives ample support from a few decisions of this Court referred to hereafter :

(15) The first in time is of course of Gurnam Singh, in *Gurmit Singh's case* (supra), the case doubted by the Motion Bench. It was held therein that Batala Co-operative Sugar Mills, Batala, a society regitered under the Punjab Co-operative Societies Act, 1961, did not become by mere registration a corporation established by or under a State Act and thus it was concluded that the accused therein were not public servant within the meaning of section 21, Indian Penal Code, distracting the applicability of section 5(2), of the Prevention of Corruption Act. For the view we have taken, we do not find any fault in *Gurmit Singh's case* (supra).

(16) In *Harjinder Singh* v. *The State of Punjab*, (6), one of us (M. M. Punchhi, J.) took the view that the Secretary of the society (in that case a salaried employee of the society) was a servant of the society, as he had to act for and on behalf of the society and that for his criminal acts and omissions section 408, Indian Penal Code, could alone be attracted.

(17) Again in *Mohan Lal* v. *The State of Punjab*, (7), one of us (S. S. Dewan, J.), took the view that as a servant of the society the Manager had to act for and on behalf of the society and for his criminal acts and omissions section 408, Indian Penal Code, could alone be attracted. The conviction in that case was altered from one under section 409, Indian Penal Code, to one under section 408, Indian Penal Code.

(18) In *Sewa Singh* v. *The State of Haryana*, (8), B. S. Yadav, J., altered the conviction of the Secretary of a Co-operative Society to one under section 406, Indan Penal Code. Such conclusion was arrived at after examining the definition of the word 'officer' occurring in section 2(h) of the Punjab Co-operative Societies Act, 1961, which expression meant a lot of many people inclusive of the Secretary, President and the Manager. Besides section 21 (tenth), Indian Penal Code was also relied upon to come to the view that section 409, Indian Penal Code, was not attracted. But abruptly

(6) 1980 P.L.R. 435.
(7) 1985(1) C.L.R. 147.
(8) 1984(1) R.C.R. 501.

the conviction was altered to one under section 406, Indian Penal Code. It appears that the Hon'ble Judge was not advised to apply section 408, Indian Penal Code, on the strength of the precedents afore-quoted.

(19) It thus appears that precedent-wise, it appears more than established that a charge under section 408, Indian Penal Code, would be attracted in a case like the present one. We hold accordingly. This would logically lead to the upsetting of the order of acquittal as the view of the learned Magistrate needs reversal both on the charge head as also on the supposed bar of limitation.

(20) Having reversed the order of acquittal, what course should be adopted to dispose of this appeal is the next question ? As permitted under section 386(a), Criminal Procedure Code, the appellate Court can, in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. The circumstances of this case are such which would not warrant re-trial of the accused. Equally when the learned Magistrate has not expressed his deliberated opinion in so many words on merits on thoroughly weighing the prosecution evidence, it would not be fair on our part to re-examine the evidence and pass verdict on the respondents. After all the respondents are entitled to have the view of the learned Magistrate in this regard, for they are presumptively innocent till proved guilty in accordance with law. Therefore, the safe course, which appears to us, is to order that further enquiry be made in the case. This does not mean either fresh enquiry or re-trial. It means the proceedings be held in continuation of the old enquiry. It even includes consideration/reconsideration of the evidence already on record and passing an order on the material so available. In a case as old as the present one, we think it appropriate to keep the learned Magistrate thus guided, for it is plain that the matter is being remanded back to him.

(21) For the foregoing reasons, this appeal succeeds, the order of acquittal is reversed, remanding the matter back to the learned trial Magistrate, directing him that he should further enquire into the matter. The parties through their learned counsel are directed

to put in appearance before the learned trial Magistrate of the area concerned on January 29, 1987.

KULWANT SINGH TIWANA, J.—I agree.

S. S. DEWAN, J.—I agree.

H. S. B.

Before D. S. Tewatia and J. V. Gupta, JJ.

BANK OF INDIA,—*Appellant.*

versus

YOGESHWAR KANT WADHERA AND OTHERS,—*Respondents.*

Regular Second Appeal No. 1988 *of* 1985

August 28, 1986.

Contract Act (IX of 1872)—Sections 128, 140 *and* 141—*Bank loaning cash credit to principal debtor against hypothecation of stocks—Repayment of loan also guaranteed by surety—Principal debtor failing to discharge debt on demand—Bank suing for recovery of loan—Court finding that hypothecated goods were lost due to negligence of the Bank and as such liability of surety stood discharged—Liability of surety in cases of hypothecation—Explained—Surety—Whether can escape liability by invoking the provisions of Section* 141.

Held, that in hypothecation as the possession of the goods hypothecated is with the borrower, it will be wrong to say that the goods are in the constructive possession of the creditor bank because it has no effective control over them. By hypothecation, only an equitable charge is created and nothing more. Similarly, the borrower could not be called an 'agent' of the creditor Bank in this respect while dealing with the hypothecated goods unless so authorised by the Bank. It cannot be disputed that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract, as contemplated under Section 128 of the Contract Act, 1872. Section 140 thereof provides that where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or