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pointed out that this Court does not in writ proceedings normally admit evidence on matters of fact and, therefore an enquiry similar to that contemplated by the Indian Arbitration Act is scarcely, if ever, held. I am not unmindful of the fact that the arbitrator in the case in hand is of the party's own choice but then that would hardly constitute a strong enough factor to militate against the view that his award should disclose that it is the result of a quasi-judicial approach by one who is called upon to adjudicate upon important contested claims.

As already observed, the question is not free from difficulty and I am expressing my view not completely without hesitation, but on the whole I am inclined, as at present advised, to consider as preferable the view that the law does not intend to confer on the arbitrator under the Act wholly uncontrolled and absolute power to make the award completely bare of reasons so as to render it incapable of judicial scrutiny by this Court under Article 226.

With these words, I would agree with the order proposed by my learned brother.

B.R.T.

REVISIONAL CRIMINAL

Before Gurdev Singh, J.

AVTAR SINGH,—*Petitioner.*

versus

THE STATE,—*Respondent.*

Criminal Revision No. 747 of 1962

1963

January, 9th.

Companies Act (I of 1956)—S. 630—Whether pro-tanto repeal S. 409 of Indian Penal Code—Offence of criminal

breach of trust committed by officer or employee of company —Whether can be tried under the Penal Code—Repeal by implication—Principles stated.

Held, that on a comparison of section 630 of the Companies Act, 1956 and section 409 of the Indian Penal Code, it is clear that whereas under section 405 of the Indian Penal Code it must be proved that the property in question had been entrusted to the offender, under section 630 of the Companies Act, it is not necessary that there should have been entrustment of the property. To prove an offence of criminal breach of trust, of which section 409 of the Indian Penal Code is an aggravated form, the prosecution has not only to make out that the property had been entrusted to the offender but also that he had dishonestly misapproporated the same or converted it to his own use or dishonestly used or disposed it of in violation of any direction of law. None of these two factors is, however, essential under section 630 of the Companies Act. There it is enough if the property has been taken possession of wrongfully or disposed of wrongfully or knowingly in violation of the provisions contained in the articles of the company or authorised by the Act. The words "wrongfully" and "dishonestly" (which is defined in section 24 of the Indian Penal Code) do not mean the same thing. The offence created by section 630 of the Companies Act is not identical to that under section 409 of the Indian Penal Code and the two provisions can co-exist, and there is no question of section 630 of the Companies Act repealing section 409 of the Indian Penal Code so far as the officers or employees of the company are concerned.

Held, that even if the offences created by two different Acts are identical, it is open to the prosecution to prosecute the offender not only for one of those offences but also to proceed against him under both the Acts, only restriction being that the offender cannot be punished twice for the same offence.

Held, that as a matter of general principle repeal by implication is not favoured, but before a provision in an existing law can be taken as having been repealed by a subsequent enactment it must be shown that the later legislation

either contains express provision to that effect or the implication of its provision is such that the legislature never intended to leave the old provision intact.

Held, that there is no question of section 630 of the Companies Act, repealing section 409 of the Indian Penal Code as far as the officers or employees of the company are concerned.

Petition under Section 439 Criminal Procedure Code for revision of the order of Shri Ram Lal Aggarwal, Sessions Judge, Jullundur, dated the 9th April, 1962, affirming that of Shri D. S. Chaudhri, Additional District Magistrate, Jullundur, dated the 9th March, 1962, dismissing the application.

H. L. Sibal & Mr. K. L. Kapoor, Advocates,—for the Petitioner.

K. Surrinder Singh, Advocate,—for the Respondent.

JUDGEMENT

Gurdev Singh, J.

GURDEV SINGH, J.—This order will dispose of two criminal revision petitions, Nos. 747 and 807 of 1962, in which the common question of law arising for consideration is :—

> "Whether section 630 of the Companies Act (1 of 1956) *pro-tanto* repeals section 409 of the Indian Penal Code so far as it relates to the offence of criminal breach of trust committed by any officer or employee of a company ?"

The matter has arisen in the following manner:

On 14th July, 1961, Dr. Diwan Singh, a shareholder of Messrs Globe Rubber Works (Private) Limited, Jullundur, made a complaint to the Superintendent of Police of that place alleging

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that the present petitioner, Avtar Singh, the Factory Manager and a shareholder of the said company, had cheated him of Rs 30,000 and entering into a conspiracy with other persons committed criminal breach of trust in respect of certain property belonging to the company. After investigation, the police put in three separate challans against the petitioner under sections 409, 409/120-B and 420 of the Indian Penal Code in the Court of the Additional District Magistrate, Jullundur. At the commencement of the proceedings in the two cases relating to offences under sections 409 and 409/120-B of the Indian Penal Code, the petitioner objected to his trial contending *inter alia* that the offence of criminal breach of trust, alleged to have been committed by him in his capacity as Factory Manager of the company, fell under section 630 of the Companies Act, 1956, which, being a provision contained in a Special Act enacted long after the Indian Penal Code was brought on the statute book, *protanto* repealed section 409 of the Indian Penal Code so far as it related to offences committed by employees and officers of a company. It was further urged that as a necessary consequence neither the police could investigate into that offence in view of the provisions of sections 235 to 251 of that Act, nor was the Court competent to take cognizance of the offence except on a complaint made by the Registrar of Companies as laid down in section 621 of the Companies Act. These objections having been repelled both by the trial Court and the Sessions Judge, before whom a petition for revision was filed, the petitioner has come to this Court challenging the decision of the Courts below that his trial for offences under sections 409 and 409/120-B of the Indian Penal Code could proceed.

The provision relating to offences under the Companies Act are contained in sections 621 to

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631 of that Act. Section 630, headed as "Penalty for wrongful withholding of property", is in the following words :—

"630 (1) If any officer or employee of a Company—

(a) wrongfully obtains possession of any property of a company ; or

(b) having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorized by this Act ;

he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may extend to one thousand rupees.

(2) The Court trying the offence may also order such officer or employee to deliver up or refund, within a time to be fixed by the Court, any such property wrongfully obtained or wrongfully withheld or knowingly misapplied, or in default, to suffer imprisonment for a term which may extend to two years."

This offence as well as other offences under the Companies Act have been declared to be non-cognizable by section 624 of the same Act. So far as the procedure for the trial of these offences is concerned, section 621, sub-section (1) of the Act lays down that, except where the prosecution is by a company or any of its officers,

"No Court shall take cognizance of any offence against this Act (other than and

offence with respect to which proceedings are instituted under section 545), which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, or of a shareholder of the company, or of a person authorised by the Central Government in that behalf."

Section 624-A of the Act contemplates the appointment of the Company Prosecutors by the Central Government for the conduct of prosecutions arising out of the Act. It is thus obvious that if the petitioner was prosecuted under section 630 of the Companies Act, the Court could not take cognizance of the case against him merely on a police report, nor could the police investigate into the matter, the offence being non-cognizable. It is further evident that on conviction under section 630 of the Companies Act, the maximum punishment to which the petitioner would be liable is a fine of Rs. 1,000 only and no imprisonment. On the other hand, if an offence under section 409 of the Indian Penal Code is proved against him, he can be sentenced to ten years' rigorous imprisonment besides being liable to fine without any limit. There can thus be no doubt that if the petitioner is not prosecuted under section 630 of the Companies Act, but tried for an offence under section 409 of the Indian Penal Code, he would be at a great disadvantage.

Shri H. L. Sibal, appearing on the petitioner's behalf, has contended that since the allegations on which the petitioner is being prosecuted under sections 409 and 409/120-B of the Indian Penal Code also make out an offence under section 630

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of the Companies Act, it was not open to the prosecution to choose under which of the two provisions of law they would proceed against him, and to deprive him of the advantage which would be available to him if he were prosecuted only under section 630 of the Companies Act. This argument is based on the further contention that the offences under section 409 of the Indian Penal Code and section 630 of the Companies Act committed by an officer or employee of the company are identical, and since the Companies Act, 1956, is a special Act enacted long after the Indian Penal Code came into force, the provisions of section 630 of the Companies Act *pro-tanto* repealed section 409 of the Indian Penal Code so far as it relates to offences committed by an officer or an employee of the company. In support of this argument, it is pointed out that the Companies Act (1 of 1956) is a later enactment, and being a special Act, its provisions must override those of the Indian Penal Code. Reliance in this connection has been placed on *State* v. *S. Gurcharan Singh* (1). In that case, a Division Bench of this Court ruled that the provisions of section 409 of the Indian Penal Code, so far as they concerned offences by public servants, were *pro-tanto* repealed by section 5(1)(c) of the Prevention of Corruption Act (2 of 1947). In that case, after an exhaustive examination of section 5 of the prevention of corruption Act and its various other provisions Falshaw, J. (as he then was), who wrote the judgment of the Court, observed :—

> "The major amendments to existing statutes in the Act are all only by implication, and it is, therefore, not difficult to come to the conclusion that the legislature by including the essentials of an offence under section 409, Indian Penal Code,

(1) I.L.R. 1954 Punj. 35.

by a public servant in Section 5(1)(c) also intended to supersede section 409, Indian Penal Code so far as it concerns public servants by section 5(1)(c), and to apply the procedural and other changes contained in the Act to public servants who committed offences punishable previously under section 409, Indian Penal Code. To hold otherwise would lead to an anomalous situation, and I must confess that I am unable to understand the attitude of the State in wishing still to have the liberty to proceed against public servants under section 409 of the Indian Penal Code, and thereby deny them the benefits of Act II of 1947 including the right to appear as witnesses, the necessity of sanction for their prosecution and the possibility not only of receiving a lesser maximum sentence of imprisonment, but also of not being sentenced to any imprisonment at all on conviction."

A contrary view was, however, taken by various other High Courts, and this decision was overruled by their Lordships of the Supreme Court in *Om Parkash Gupta* v. *The State of U.P.* (2). Accepting the view of a Full Bench of the Bombay High Court in the *State* v. *Pandurang Baburao* (3), and that of the Calcutta High Court in *Amarendra Nath Roy* v. *The State* (4), it was held that there was no implied repeal of section 409 of the Indian Penal Code, so far as it related to the public servants, by section 5(1)(c) of the Prevention of Corruption Act, and it was open to the prosecution to proceed against a public servant

(2) A.I.R. 1957 S.C. 458.
(3) A.I.R. 1955 Bom. 451.
(4) A.I.R. 1955 Cal. 236.

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under either of those provisions. The learned Judges further pointed out that the offences under section 409 of the Indian Penal Code and section 5(1)(c) of the Prevention of Corruption Act were distinct and separate. This view was reiterated by the same Court in its later decision, *State of Madhya Pradesh* v. *Veereshwar Rao Agnihotri* (5), where it was observed:—

> "The offence of Criminal misconduct punishable under section 5(2) of the Prevention of Corruption Act (2 of 1947) is not identical in essence, import and content with an offence under section 409 of the Indian Penal Code. The offence of criminal misconduct is a new offence created by that enactment, and it does not repeal by implication or abrogate section 409 of the Indian Penal Code".

Shri H. L. Sibal sought to distinguish these Supreme Court decisions by pointing out that to some extent their Lordships were influenced by the fact that the Prevention of Corruption Act (2 of 1947) was a temporary Act. It is true that a note of this fact was made, but the view taken by their Lordships rested on the wider ground that the relevant provisions of the two Acts were not identical, but they created separate and distinct offences.

The argument that where an act or omission constitutes an offence under two different enactments, the prosecution is not a liberty to choose under what provision of law the offender shall be prosecuted, cannot be entertained in view of the

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(5) A.I.R. 1957 S.C. 592.

provisions of section 26 of the General Clauses Act, which lays down:—

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

From this it is clear that even if the offences created by two different Acts are identical, it is open to the prsecution to prosecute the offender not only for one of those offences but also to proceed against him under both the Acts, the only restriction being that the offender cannot be punished twice for the same offence. It is well-settled, as observed in the Punjab case (*State* v. *S. Gurcharan Singh* (1), itself that as a matter of general principle repeal by implication is not favoured, but before a provision in an existing law can be taken as having been repealed by a subsequent enactment it must be shown that the latter legislation either contains express provision to that effect or the implication of its provision is such that the legislature never intended to leave the old provision intact. The test for determining whether there has been repeal by implication was stated in the following words by Dr. Lushington in "The India" (1864) 3 L. J. Adm. 193, which are quoted at page 344 of Craies well-known book on Statute Law (5th Edition):—

> "The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject

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matter were taken away by the subsequent statute."

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Maxwell in his Interpretation of Statutes (10th Edition, page 186) says:—

> "It would seem that an Act which (without altering the nature of the offence as by making it felony instead of misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the pre-existing law."

Thus in order to determine whether there has been *pro tanto* repeal by implication, we have to examine the scope of the two provisions and find out provisions and find out if they can co-exist and relate to identical offences.

Section 409 of the Indian Penal Code is the offence of criminal breach of trust when committed by a public servant, banker, merchant, broker, attorney or agent. Analysing the provisions of section 405 of the Indian Penal Code, which defines the offence of criminal breach of trust, Govenda Menon J. in *Om Parkash Gupta's case* stated the essential ingredients of the offence as follows:—

(i) The accused must be entrusted with property or dominion over property;

(ii) The person so entrusted must—

(a) dishonestly misappropriate or convert to his own use that property; or

(b) dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust."

Coming to section 630 of the Indian Companies Act (1 of 1956), we find that the act of mere wrongful obtaining of possession of any property of a company or wrongfully withholding it, or knowingly applying it to purposes other than those expressed or directed in the Articles of the company and authorized by the Companies Act, would be punishable. Unlike the offence under section 409 of the Indian Penal Code, dishonest misappropriation is not one of the ingredients of the offence, nor there need be any "entrustment with property or with dominion over propperty".

On a comparison of section 630 of the Companies Act and section 409 of the Indian Penal Code, we find that whereas under section 405 of the Indian Penal Code it must be proved that the property in question had been entrusted to the offender, under section 630 of the Companies Act, it is not necessary that there should have been entrustment of the property. This section covers the case of a person who obtains the possession of company's property wrongfully, and also penalizes a person who wrongfully withholds it or wrongly applies it to purposes other than those expressed in the articles and authorized by the Act. To prove an offence of criminal breach of trust, of which section 409 of the Indian Penal Code is an aggravated form, the prosecution has not only to make out that the property had been entrusted to the offender but also that he had dishonestly misappropriated the same or converted it to his own use or dishonestly used or disposed it of in violation of any direction of law. None of these

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two factors are, however, essential under section 630 of the Companies Act. There it is enough if the property has been taken possession of wrongfully or disposed of wrongfully or knowingly in violation of the provisions contained in the articles of the company or authorized by the Act. The words "wrongfully" and "dishonestly" (which is defined in section 24 of the Indian Penal Code) do not mean the same thing.

If an act is done wrongfully, that may not necessarily involve any element of dishonestly or an intention to cause wrongful gain to one person or wrongful loss to another. It is thus evident that the offence created by section 630 of the Companies Act is not identical to that under section 409 of the Indian Penal Code and the two provisions can co-exist. Section 282-A of the old Act (7 of 1937) to which section 630 of the present Act corresponds, was considered by a Division Bench of the Madras High Court in *re- M. Baidyanathan* (6). Affirming a Single Bench decision of that Court, reported as *M. Vaidyanathan* v. *The Sub-Divisional Magistrate, Erode, and others* (7), the learned Judges held that the scope of that section was quite distinct and different from that of sections 406, 409 and 477-A of the Indian Penal Code, and, therefore, there could be no bar to the police investigation into the later offences.

This view finds support from a recent decision of the Supreme Court in the *State of Bombay* v. *S. L. Apte and another* (8). While considering whether a person who had been convicted under section 409 of the Indian Penal Code could be later proceeded against for an offence under section 105

(6) A.I.R. 1957 Mad. 432.
(7) A.I.R. 1957 Mad. 65.
(8) A.I.R. 1961 S.C. 578.

of the Insurance Act, their Lordships of the Supreme Court held that the two offences were distinct and there was nothing to prevent his trial for both the offences. It was further ruled that the rule as to double jeopardy embodied in Article 20(2) of the Constitution could not apply to such a case. This decision proceeds on comparison of the provisions of section 405 of the Indian Penal Code and section 105 of the Insurance Act. The Latter provision is identical to that contained in section 630 of the Companies Act. On a comprison of the two, their Lordships pointed out that though some of the ingredients of those offences were common they differed in some othre respects. They observed:—

> "Whereas under section 405 of the Indian Penal Code the accused must be "entrusted" with property or with "dominion over that property", under section 105 of the Insurance Act the entrustment or dominion over property is unnecessary; it is sufficient if the manager, director, etc., "obtains possession" of the property.
>
> The offence of criminal breach of trust (section 405 of the Indian Penal Code) is not committed unless the act of misappropriation or conversion or the "disposition in violation of the law or contract", is done with a dishonest intention, but section 105 of the Insurance Act postulates no intention and punishes as an offence the mere withholding of the property—whatever be the intent with which the same is done, and the act of application of the property of an insurer to purposes other than those

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authorised by the Act is similarly without reference to any intent with which such application or misapplication is made."

In this view of the matter there is no question of section 630 of the Companies Act repealing section 409 of the Indian Penal Code so far as the officers or employees of the company are concerned. Accordingly, the petitioner's prosecution under section 409 as well as under section 409/120-B of the Indian Penal Code could proceed. Both the petitions (Criminal Revision No. 747 and 807 of 1962) are, accordingly dismissed. The records of the cases shall be returned to the trial Court, where the petitioner shall appear on 4th February, 1963.

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