

Investigation of Cases relating to Criminal Misappropriation and Criminal Breach of Trust

- **K.Madhavan**, Jt. Director (Retd), CBI.

Investigating cases of criminal misappropriation and criminal breach of trust involving simple allegations does not pose much of a problem to an Investigating Officer. However, many cases involve complex facts and points of law and sometimes what apparently looks like an offence of criminal breach of trust may not be so in law. It is therefore necessary for all police officers to know (a) the ingredients in law of these offences (b) the facts required to prove them and (c) the mode of collecting such facts (evidence), particularly in cases relating to companies, etc.

Criminal misappropriation is defined in Section 403 of the Indian Penal Code. According to this Section whoever dishonestly misappropriates or converts to his own use any movable property commits the offence of criminal misappropriation. It will be seen that the ingredients of this offence are:-

- (a) dishonest misappropriation or conversion of property for person's own use
- (b) Such property must be movable.

A specific mensrea of "dishonesty" is essential if an offence under section 403 is to be made out. Section 24 IPC states that "whoever does anything with intention of causing wrongful gain to one person or wrongful loss to another person is said to do the thing dishonestly". It should be noticed that it is enough if either wrongful gain or wrongful loss exists.

Section 23. IPC states:-

"Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled."

A person is said to gain wrongfully when

such person retains wrongfully as well as such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property."

The illustrations to Section 403 IPC as well as the explanations under the section make it clear that the following acts are not offences:-

1. Taking a property belonging to another person out of that person's possession in good faith, believing, at the time of taking the property that the property belongs to the person who takes it (illustration a);
2. Taking a book from a friends" library without his express consent and under the impression that 'there is an implied consent of the friend to take the book for the purpose of reading it (illustration b); and
3. Taking a horse out of the possession of another person which person is a joint owner of the horse (illustration c).

Explanation 1 to Section 403 IPC refers to what is commonly termed as "temporary misappropriation'. Under Explanation 1, a dishonest misappropriation for a time only is a misappropriation within the meaning of this section. It is thus clear that legally, temporary (criminal) misappropriation is at par with "permanent" (criminal) misappropriation. However, the fact that the criminal misappropriation was only temporary may be a mitigating factor so far as the sentence is concerned.

Criminal misappropriation takes place when the possession has been innocently or casually obtained, but where, by subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining of the same becomes wrongful. No entrustment is required for this offence to be constituted. The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already in the possession of the offender.

The word "to appropriate" in this connection means setting apart for, or assign to a particular person or use. The word "misappropriate" means to set apart for or assign to a wrong person or a wrong use, and this act must be done dishonestly. The word "misappropriation" is, in the illustration and in the explanations to this section, replaced by the expression "appropriates to his own use", which seems equivalent to "setting apart for his own use to the exclusion of others". It does not, however, follow from this that such setting apart by one person for the use of some person other than himself and the true owner is not criminal appropriation. (Rajindra Singh -1960 Cr.L.J. 857 and Inder Singh (1925) 18 Allahabad 268). Similarly, an owner of property in whichever way he uses his property and with whatever intention, will not be liable for criminal misappropriation and that would be so, even if he is not exclusive owner thereof. A partner has, undefined ownership (along with the other partners owns all the assets of the partnership. If he chooses to use any of the property of the partnership) for his own purposes, he may be accountable civilly to the other partners. But he does not thereby commit any criminal misappropriation (Volji Raghavji 1965 SC 1433-1965 (2) Cr.L.J.431).

The distinction between theft and criminal misappropriation is that in the former the mensrea exists even at the time of taking the property while in the latter the mensrea comes into play subsequently.

A false denial of a loan is not in itself a misappropriation and may amount to no more than an attempt to evade civil liability. Attempt to evade civil liability does not necessarily imply that the property has been criminally misappropriated. The false denial of a loan is compatible with the absence of criminal misappropriation, and no more constitutes criminal misappropriation than the possession of stolen property constitutes theft. The false denial may be evidence of an offence under the Section as Possession of stolen property may be evidence of an offence under Section 379 or Section 411 IPC.

The offence of criminal misappropriation under Section 403 IPC is not cognizable and, therefore, investigation into the case should be made only after obtaining the order of the competent court under Section 155 (2) Cr.P.C.

Section 405 IPC defines **criminal breach of trust** as under:-

"Whenever, being in any manner entrusted with property, or with any dominion over property dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust".

It will be seen that the ingredients of this section are:-

1. Entrusting any person with property or with any dominion over property.
2. The person entrusted.
 - (a) dishonestly misappropriating or converting to his own use that property; or
 - (b) dishonestly using or disposing of the property or wilfully suffering any other person so to do 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.

It will be noticed that as with criminal misappropriation, the mensrea required for criminal breach of trust is also "dishonestly". The terms of this section are very wide. It applies to one who is in any manner entrusted with property or dominion over property. The section provides that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him, this part of the definition is complete in itself he commits criminal breach of trust. It has no reference to the provision as to disposal in violation of a direction of law, or of a legal contract. These are separate ways in which criminal breach of trust may be committed. The section embraces the cases of all those offenders not specifically provided for in section 407, 408 and 409 which are aggravated forms of criminal breach of trust. Offences committed by trustees with regard to trust property fall within the purview of this section.

To establish a charge of criminal breach of trust, the prosecution is legally not obliged to prove the precise mode of conversion or

misappropriation by the accused, though such proof will strengthen the case. The Principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may, in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation of conversion.

It is an essential condition that the property which is the subject matter of the offence must have been entrusted to a person. "Entrustment" is not necessarily a term of law. It may have different contexts. In its most general significance, all it means is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all. The word "entrusted" conveys and includes that the person handing over the property must have confidence in the person taking the property. That confidence cannot arise when the property was acquired by the offender by some trick. The ownership of beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

When this section speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a trusteeship whereby the owner of a property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the

legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the owner. This section does not contemplate that the property in respect of which an offence of criminal breach of trust may be committed must be property which belonged to the complainant. If there is entrustment of property, it matters little whether the complainant on whose behalf the property is entrusted, is the owner thereof or not. Entrustment will arise whenever something, whether it is money or any other thing, is given to some person with some direction as to how it should be dealt with.

Although a person could not have obtained a permit to purchase an article, if it had not been intended that the article would be used for a certain specific purpose, the purchaser cannot be said to, have been entrusted either with the property or of any dominion over the property. He cannot therefore, be guilty of criminal breach of trust, even if he diverts and disposes of the property for a purpose other than that for which he was granted the permit (Jaswantlal AIR 1963-SC-700).

The following rulings will illustrate the point of "entrustment" further:-

- i) The words 'in any manner' used in the section do not enlarge the term "entrusted" itself and unless there is entrustment, the transaction in question cannot be affected by the terms of this section.(Satyendra Nath Mukherjee 1974-I Cal.97)
- ii) The law contemplates that the accused should receive the property and hold it on behalf of another, so that he should be the trustee of the property

(Surendra Pal Singh 1957 Cr.L.J.170).

- iii) The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner (Jaswantlal 1968 cr.L.J.803-AIR SC 700).
- iv) The ownership or beneficial interest in the property in respect of which Criminal Breach of Trust is alleged to have been committed, must be in some person other than accused and the latter must hold it on account of some person or in some way for his benefit (Ittiravi Nambudiri 1954 cr.L.J.102 Sheonarayan 1953 Cr.L.J.1289).

The Supreme Court has held that there is no good reason to restrict the meaning of the word "**property**" to movable property only when it is used without any qualification in Section 405 or in other Sections of the Penal Code. Whether the offence defined in a particular section of the Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word "Property" but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the word "Property" in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed. In this case after reviewing the case law on the point, the Supreme Court observed that the case law is more in favour of the wider meaning being given to the word "property" in sections where the word is not qualified by any other expression like "movable" (R, K, Dalmia (1963)

I S.C.R. 253 (1962) II Cr. L.J.805, overruling regarding V. Giridhar Dharmadas, 6 Bom.H.C.R. (Cr.) 33 and Jugdown Sinha (1895) 23 Cal. 372 and approving Bishan Prasad, 27, All. 128, Ramchandra Gurvala, (1926) AIR Lah, 385, Manchershah Ardeshir V. Ismail Ibrahim, 60 Bom. 706 and Daud Khan, 27 Cr. L.J. 17)

For proving a case of criminal breach of trust the prosecution must establish:-

1. That the accused was entrusted with property or with dominion.
2. That he (a) misappropriated it, or
(b)Converted it to his own use, or
(c) used it, or
(d) disposed it.
3. That he did so in violation of (a) any direction of law prescribing the mode in which such trust was to be discharged or (b) any legal contract express or implied, which he had made touching the discharge of such trust, or that he wilfully suffered some other person to do as above.

It is neither necessary nor possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, since by law even temporary retention, provided it is dishonest, is an offence. But where there is no direct evidence of misappropriation and one is left to surmise as to what use was made by the accused of the money, the court would require clearer evidence of dishonest intention. Again as the principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may, in the light of other circumstances, justifiably lead to an inference

of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases be founded merely on this failure to account for the property entrusted to him, or over which he had domain, even when a duty to account is imposed upon him, but where he is unable to or render an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made (AIR 1960 SC 889).

Mere acts of negligence on the part of the accused in complying with the relevant rules would not suffice to hold that he "wilfully suffered" the embezzlement of money by another. There must be further evidence to show that he intentionally committed to comply with the rules or that he deliberately connived at such embezzlement by shutting his eyes to what was going on "Wilful". Wilful suffering means deliberate or intentional and not accidental or by inadvertence. (Surrender Nat Satpathy 1953 cr.L.J.1071 Dedarnath 1965 cr.L.J.539)

In a case of criminal breach of trust arising out of the misappropriation of a number of sums, the proper course for the prosecution is to select three items on which to proceed in the first instance and to give some general evidence as to the amount believed to have been misappropriated. In view of Section 212(2) of the Criminal Procedure Code, this is not necessary but if it is done, the accused cannot complain of multifariousness

The distinction between criminal misappropriation and criminal breach of trust is that in the former the property comes into the possession of the offender by some casualty or otherwise and he afterwards misappropriates it. In the latter, the offender is lawfully entrusted with the property and he dishonestly

misappropriates the same or willfully suffers any other person to do so instead of discharging the trust attached to it.

Criminal Breach of Trust is punishable under Section 406 Cr.P.C. We find that the Sections that follow, award far more severe punishment for the commission of criminal breach of trust, by certain types of persons in whom the confidence is created by the very nature of their jobs and a special fiduciary relationship exists between the accused and the person entrusting the property. Thus section 407 IPC deals with criminal breach of trust committed by a carrier. Wharfinger means a person who owns or keeps a wharf and allows goods which are brought to or from water to be kept on the wharf. Warehouse keeper is one who keeps a warehouse, which is a place to deposit or keep wares in. Wares can be any goods, commodities or merchandise. Section 408 IPC deals with criminal breach of trust committed by a clerk or servant.

We now come to Section 409 IPC which is an important section because **Criminal Breach of Trust committed by public servants** are covered by this Section which reads as under:

"Whoever being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine"

In order to prove an offence under Section 409 IPC, the prosecution must establish:-

1. That the accused was either a public servant or a banker, or a merchant, or a factor, or a broker or an attorney, or

an agent.

2. That he was in such capacity entrusted with the property in question or with dominion over it.
3. That he committed criminal breach of trust in respect of it.

A comparative reading of Section 409 r/w 405 IPC and Sec.5 (1) (c) of the Prevention of Corruption Act, 1947 would show that the two offences are similar in various aspects. Some High Courts had therefore, held that Sec.5 (1) (c) P.C. Act, 1947 (13(1) (c) P.C. Act, 1988), had in effect repealed Section 409 IPC. Some other High Courts had held that it did not. This controversy was set at rest by the Supreme Court in Om Prakash Gupta Vs. State (AIR 1957 SC 458-1957 Cr.L.J. 575). The Supreme Court has brought out the distinction as under:-

"Section 405 IPC Vs Section 5(1) (c) of P.C.Act, 1947

1. Entrusting any person with property or with any dominion over property.
2. The person entrusted dishonestly misappropriating.
 - a. or converting to his own use that property
 - b. dishonestly using or disposing of that property or willfully suffering 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.

Dishonestly or fraudulently misappropriating or otherwise converting for his own use any property entrusted to him or under his control

as a public servant or allowing any other person to do so.

Dishonestly as defined in Section 24 IPC connotes the doing of anything with the intention of causing wrongful gain to one person or wrongful loss to another person and Section 25 defines "fraudulently" as doing a thing with intent to defraud but not otherwise.

From the comparison of the provisions of the two sections, it is further clear that an offence under Section 405 Penal Code is separate and distinct from the one under Section 5 (1) (C). There are three points of differences between Section 405 Penal Code and Sec. 5 (1) (C) P.C. Act. The dishonest misappropriation contemplated in Section 405, penal code is "dishonestly", whereas that under Section 5 (1) (C) is either dishonest misappropriation or fraudulent misappropriation. The latter section is much wider in amplitude than the former. "In Section 405 Penal Code, the words used are in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied". There are no such expressions in Sec. 5 (1) (C). It is clear, therefore, that whereas under Section 405 Penal Code, there are three essential ingredients to constitute the offence; each one of them being separate and distinct, in Sec. 5 (1) (C), there are only two. Now considering Sec. 5 (1) (C) there are certain matters in it which are absent in Section 405, Penal Code. The words "dominion" and "entrustment" cannot be two different things. The word "dominion" is not in Sec. 5 (1) (C). Under Sec. 5 (1) (C) the gist of the offence can also be made out if the offender allows any person to do so, i.e. allows any person to derogate from the law as contemplated in the earlier portion of the section. The meaning put on the word "allows"

would certainly be different from "dishonest misappropriation" by the offender himself. It may be that the word can mean allowing by negligence or without any violation on the part of the offender. It may also mean that there is some kind of positive and tacit acquiescence necessary to bring home the offence. In any event, allowing other persons to do so does not find place in Section 405 Penal Code, though this section also contemplates "willfully suffering any other persons to do so".

There are a number of elements which can be proved in an inquiry or trial under Sec. 5 (1) (C) that cannot be let in by the prosecution when a person is charged for an offence under Section 405 Penal Code. In Section 405 Penal Code, the offender must willfully suffer another to misappropriate the property entrusted, but in Sec. 5 (1) (C) if he allows another person to dishonestly or fraudulently misappropriate or otherwise convert for his own use any property entrusted, then it is an offence. There is a vast difference between willfully suffering another and allowing a person to do a particular thing and in our view (as stated by the Supreme Court) the word "allows" is much wider in its import. Willfully pre-supposes a conscious action, while even by negligence one can allow another to do a thing.

The Supreme Court held that "it is thus clear that the two offences are distinct and separate".

In a later case State of M.P Vs. Veereswara Rao Agnihotri (AIR 1957 SC-592-1957 Cr.L.J. 892) also the Supreme Court has reiterated the same views.

From the practical point of view, however, it is better to charge a public servant under Sec. 5(2) r/w 5 (1) (C) of the P.C. Act, 1947 unless there are special circumstances to resort to Section 409 IPC.

Stolen property, as defined under Section

410 IPC includes property which has been criminally misappropriated or in respect of which a criminal breach of trust has been committed. Therefore, dishonestly receiving or retaining such property, knowing or having reasons to believe the same to be stolen property are offences punishable under Section 411 IPC.

As soon as the investigation of a complicated case of criminal breach of trust is taken up by the I.O, he should immediately seize the relevant documents from the company, either by serving an order under Section 91 Cr.P.C. or by a search. In this context, it should be mentioned that our experience in such cases wherein big companies are involved has been, that resorting to the provisions of Section 165 Cr.P.C. and conducting searches without warrants is fraught risk. This is because the power of search under Section 155 Cr.P.C. is not an absolute power and can be exercised only under certain circumstances. Stated briefly, the legal position is that if there is time to take a search warrant, it should be obtained before a search is conducted. In preparing the application for obtaining the warrant, the legal requirements of Section 93 of the Cr.P.C. should be borne in mind and clearly mentioned in the application.

While applying for a Search Warrant to the Court, the I.O. should bear in mind that in *V.S Kuttan Pillai Vs. Ramakrishnan and others* (1980 Cr.L.J. 196- AIR 1980 SC 185) the Supreme Court has held that a Search Warrant against an accused has to be applied for and got u/s 93(1) (c) of the Cr.P.C. and not u/s 93(1)(a) of the Cr.P.C.

Let us now try to generally classify the types of documents that will have to be seized in a case of criminal breach of trust relating to a company. These documents are (1) Cash Book,

(2) Ledger, (3) Journal Book, (4) Vouchers (cash and journal including supporting documents), (5) Correspondence files including telex messages (6) Minute Books of the meetings of the Board of Directors (7) Counterfoils of cheques and pay-in-slips (8) Account Statements received from banks (9) other relevant documents.

In such cases, it may also become necessary to conduct searches of the residences of some of the Directors and senior Executives of the company. If such searches are conducted, then emphasis should be made to seize the bank accounts of the persons concerned which often throw considerable light on their financial dealings in general and the disposal of the property in respect of which criminal breach of trust was committed, in particular.

In such searches, an important aspect to be borne in mind is the fact that the documents will have to be ultimately proved in a court of law. For this purpose, the first and last pages of the bound books can be got signed and dated by the witnesses to the search. The witnesses will also have to be requested to sign or initial every sheet of loose paper that may be seized including sheets kept in files. Otherwise, there is the risk that the accused may challenge the genuineness of the documents.

Innovations will have to be made in this regard on the spot depending upon the circumstances. Thus, if the loose documents are far too many and the witnesses show reluctance (as they often do) in initialling all such documents, the documents, can be divided into two portions. One witness can sign or initial one portion of the loose documents and the other witness the other portion. In the search list, it should be clearly mentioned as to which witness had signed which documents. This can be done at the end

of the search list by referring to the serial numbers of the documents in the search list. Another method can be to affix the rubber stamp seal of the company in the loose documents and giving specimen impression of the rubber stamp seal in all the copies of the search list. Care should, however, be taken to return the rubber stamp seal.

In this matter, it should be borne in mind by the I.O. that under the provisions of the Companies Act, all books of account including vouchers of every company for a period of not less than 8 years immediately preceding the current year should be preserved in good order. In the event of a company taking the plea that its books, say of a period of six years before the current years have been destroyed, this provision can be usefully cited by the I.O. so that the executives of the Company can be persuaded to produce the books from wherever they have kept them.

A **Chartered Accountant** should be associated in the investigation whenever complicated accounts are involved. The accounts should be carefully scrutinized by the Chartered Accountant and later by the I.O. with his guidance. At the time of his scrutiny, the I.O. should have as good knowledge about the relevant entries as the Chartered Accountant himself. Often it is useful to prepare charts showing the disposal of the monies. These charts have been found to be of great help when complicated chain transactions are involved. The signed report of the Chartered Accountant should be obtained regarding the result (with reasons) of his scrutiny. This report is admissible in evidence u/s 65(g) of the Evidence Act.

Once the relevant entries are traced, they should be proved by examining the concerned witnesses viz. employees of the company. For this purpose, the persons who wrote the vouch-

ers, checked them and passed them should be examined. Similarly, the persons who wrote the entries in the account books should be examined. No doubt, the persons who wrote the minute books and conducted the correspondence will also be carefully examined and outside persons who had issued or signed the sub-vouchers should also be examined and if necessary their account books, correspondence, vouchers etc be seized. Often extensive field investigation will have to be conducted to prove that the vouchers are either forged or false or both.

In such cases, the creation of sources in and outside the companies is of great importance. Most of the company cases have been successfully investigated only with the aid of sources.

Usually in such cases, it becomes necessary to conduct some investigation with banks in which the company used to maintain its account. The documents that are usually found to be required from banks are:-

- a) Certified copy of statement of accounts. It may be mentioned that the account books of bank are protected from seizure under the Bankers Book Evidence Act and cannot be seized during investigation. The said Act provides that a certified copy of the account will suffice (The other documents of the Banks have no such protection)
- b) Correspondence of the Company with the Bank.
- c) Original Cheques
- d) Original pay-in-slips
- e) Authorisations given by the company to the Bank from time to time regarding the persons who can sign cheques, etc on behalf of the

company.

f) Any other relevant document.

These documents should be proved by examining the concerned officials of the bank and the company.

In such cases, it is not sufficient to just prove the commission of criminal breach of trust. Different persons play different roles in the transactions and it often becomes difficult to prove the **criminal liability** of persons placed high in the hierarchy of the companies, such as Directors. In many cases, criminal breach of trust is usually committed by the Directors themselves, though the relevant documents would have been signed by the employees of the company. In such cases, it often becomes useful to have one or more approvers. Sources have also been found to be of help in such instances.

During the investigation, the I.O should carefully and thoroughly interrogate the employees who signed the vouchers and efforts should be made to elicit from them the persons who ultimately benefited from the transfer of amounts. It is also necessary that the Constitution of the Companies should be studied carefully to find out the extent of interest of the accused. This can be done by referring to the Memorandum and Articles of Association of the Company and details of share holdings. The personal amount of the accused in the companies and banks should also be carefully scrutinized. The minute books of the Board of Directors as well as the correspondence files will also give useful evidence in this regard.

The following remarks of the Supreme Court in *Official Liquidator Vs P.A. Tendolkar* (1973 com. Cases 382) are extremely relevant from the point of view of an investigating officer when the involvement of a Director is suspected. *"A Director may be shown to be*

placed and have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of the company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to every one who examines the affairs of the company even superficially. If he does so he could be held liable for dereliction of duties even if he is not shown to be guilty for participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company."

The I.O. must, however, remember that in a criminal case good evidence must be available to prove the guilt of a Director.

Investigation may have to be conducted also in the office of the **Registrar of Companies** to whom certain periodical returns have to be submitted by the Company. Thus, whenever there is a change of Directors in a Company, statements in a prescribed proforma have to be sent to the Registrar of Companies. These documents would prove who were the Directors at the relevant time. Evidence should be collected to prove, in appropriate cases, that the Directors had committed criminal breach of trust and not just the employees who were only used as instruments to achieve the criminal objectives of the Directors etc.

In this context, the I.Os should remember that under the Commercial Documents Evidence Act, 1939, it is enough if the certified copies (obtained from the Registrar of Companies) of the following documents are collected for production in Court and the originals are not required. These are (a) Memorandum of Association (b) Articles of

Association (c) Balance Sheet, and (d) Profit and Loss Account. The Registrar of Companies does not usually part with the original documents.

Following are few modus operandi which have come to notice in respect of economic offences committed by Directors of Companies in India:-

- i) manipulation of accounts by transfer of funds among group companies interse, forgery of vouchers, etc.
- ii) Extinguishing capital reserves and profits before liquidating the companies.
- iii) Showing false purchase of raw material and other items. Another violation of this is excess payment to the suppliers and sharing the diverted funds with such suppliers.
- iv) Setting benami sole selling agents with a view to showing reduced profit for the company and diverting the excess profit to such benami agents who are generally relatives or close friends of the active Directors.
- v) Transfer of assets to firms taken into liquidation.
- vi) Use of company funds to seize control of other companies.
- vii) Obtaining of loans from the bank and the public either without security or on the basis of false inflated security.

In some cases, it has been seen that for the purpose of systematic siphoning of funds, bogus concerns are brought into existence. They serve as purported suppliers of goods, etc., and receive monies from the Company. These firms are set up by the Directors of the Company

itself or by their nominees. In order to investigate such cases, the I.O. should take charge of all the records of such concerns. He should also seize all original cheques issued by the Company in favour of the concerns. He should also trace all the bank accounts opened by such concerns and collect from the Bank, the account opening forms, specimen signature cards, statements of account, cheque, pay-in-slips, correspondence, etc; to prove the receipt and disbursement of the accounts by such firms.

In order to prove the non-existence of such firms, the I.O. should examine the actual occupant of the building given as the address of the firms, the land lord, beat postman, neighbours, officials of the income tax and sales tax departments and officials of Municipalities dealing with shops etc.

Such bogus firms are also set up as sole selling agencies, etc. The mode of investigation in such cases would more or less be the same.

Apart from making false entries in the books often other forgeries are also committed to facilitate the commission of criminal breach of trust. In such case therefore, the I.O. should carefully study the relevant documents and establish the forgeries by referring the documents to the handwriting expert. Such forgeries may be in the nature of creation of the entire document itself, alteration of the amount or date by erasure and overwriting, etc. Whatever examination is indicated (such as ultra violet examination or infra red examination) should be got done. Sufficient standard and specimen writings and signatures of the concerned persons have also to be obtained and provided to the expert for obtaining his opinion.

The following offences of the Companies

Act, 1956 and IPC are similar:-

S.No	Description of offences	Companies Act Section	IPC Section
1	Falsification of accounts	538	477 A
2	Falsification of securities etc	539	467
3	Criminal Breach of Trust	540 & 630	409

It has been held in the following cases that even in respect of facts making out an offence under the Companies Act, if the police take action treating it as an offence which is made out on the same facts under the IPC., there is no legal bar to the police doing so and filing a charge sheet instead of proceeding under the Companies Act.

- 1) M.Vaidyanathan Vs Sub Divisional Magistrate, Erode (AIR 1957 MAD.65)
- 2) Indian Express Vs Chief Presidency Magistrate (1978 (II) MIJ 469)

Police officers should bear in mind that u/s 624 of the Companies Act, all offences under the said Act are non-cognizable. Also u/s 621 of the Companies Act, in respect of offences

under the Companies Act, the Court can take cognizance of an offence only on a complaint by the Registrar of Companies or a share holder or a person authorized by the Central Government in this behalf. A police officer cannot therefore file such a complaint. However, a police officer can file a charge sheet in respect of IPC offences.

In such cases usually Sections 120-B, 403, 406 to 409, 467, 471,477A IPC are attracted, Section 420 IPC or other sections of law may also have to be added depending upon the facts of the case.

Such cases involving complicated accounts, forgeries, etc. are challenges to I. Os and their successful investigation is possible only by painstaking scrutiny of documents with a proper understanding of their significance and a thorough investigation. The most important documents should be repeatedly scrutinized at intervals and each time, a new line of investigation may suggest itself to the I.O.

