

V. Shivananda Kumar Vs. Dr. S. Gurusiddappa

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Court : Karnataka

Decided On : Aug-03-2004

Reported in : ILR2004KAR4570; 2004(7)KarLJ376

Judge : S.B. Majage, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 245(2) and 482;
[Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 406, 420, 422, 467 and 468;
Criminal Procedure (Amendment) Code , 1974

Appeal No. : Cr. P. No. 1030/2003

Appellant : V. Shivananda Kumar

Respondent : Dr. S. Gurusiddappa

Advocate for Def. : K.M. Chandra Prasad, Adv.

Advocate for Pet/Ap. : Satyanarayana, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S.B. Majage, J.

1. In this petition, the petitioner-complainant has requested to quash the impugned order of the learned Magistrate and also the order passed by the Sessions Court confirming that order.

2. Brief facts, which gave rise to the present matter before this Court, are:

Complainant became friendly with the respondent-accused - a lecturer then in Central College, who used to visit Canara Bank, where he (complainant) was working as a Clerk, and house later. With a malafide intention to deceive, the accused requested him (complainant) to arrange loan of Rs. 10 lakhs for promotion of garments business in Wilson Garden at Bangalore with a promise to return the same along with interest within 3 years and also to secure a job to him (complainant) in any Bank at U.S.A. That was believed by the complainant when the accused dishonestly induced him and as such, he arranged and paid loan of Rs. 9 lakhs to the accused on different dates. Thus, the accused cheated him by making false promises and false representation that he was the Proprietor of the said garment factory and executed agreement hypothecating machines etc., of said garment factory, though the accused was not its proprietor and not intending to get a job to him in U.S.A. or return the amount taken. So, according to complainant, accused made false representations to have amount fraudulently from him and had the same on different dates and left India in May 1990 after cheating him and thereby committed various offences namely, cheating, committing criminal breach of trust etc., punishable under Sections 406, 420, 422, 467, 468 and 120B of I.P.C.

However, after recording sworn statement of the complainant and considering the documents filed by the complainant along with the complaint, the learned Magistrate issued process against the respondent-accused for the offence punishable under Section 420 of IPC only. On his appearance, the respondent-accused filed an application under Section 245 of Cr.P.C. requesting to discharge him. After hearing both sides, the learned Magistrate passed an order dated 18.12.1998 discharging the respondent-accused under Section 245(2) of Cr.P.C. That was unsuccessfully challenged by the petitioner-complainant in the Court of Sessions in Cr LR.P.No. 261/1998. It was dismissed on 28.9.2001. Hence, the

petitioner is before this Court under Section 482 of Cr.P.C.

3. After notice to the respondent-accused, with consent of both sides, taken the matter for final hearing and heard both sides. Perused the records carefully.

4. It was contended for the petitioner-complainant that without considering whether charge could be said to be groundless or, whether prima facie, there is sufficient material to proceed further against accused for framing charge, the learned Magistrate has wrongly discharged the respondent-accused on surmises and conjectures, that too, without considering the material on record (though not permissible under law to do so) and, that the entire approach to the matter by both the courts was against the letter and spirit of Section 245(2) of Cr.P.C. and as such, both the impugned orders require to be quashed.

5. On the other hand, it was vehemently argued for the respondent-accused that the learned Magistrate was well within his jurisdiction to appreciate the material on record and form an opinion as to whether the accused could be discharged and that the averments in the complaint and material on record, when gone through, clearly demonstrate that it was the petitioner-complainant, who himself assumed and thought that he would be getting a job through the respondent-accused and not that the respondent-accused had misrepresented the complainant at any time that he would secure a job for the complainant in U.S.A. and, at any rate, the view taken by the learned Magistrate, affirmed by the learned Sessions Judge, does not require to be interfered with by this Court. Perused the records carefully.

6. It is well settled that for the purpose of Section 245 of Cr.P.C, the Court has to prima facie consider, whether or not there is sufficient ground for proceeding against an accused. If need be, reference can be had to a decision of the Supreme Court in the case of SURESH v. STATE OF MAHARASHTRA : 2001 CriLJ1697 . Of course, while doing so, the Court can appreciate the material on record for that limited purpose and not that, it could consider as could be done while finding out the guilt or otherwise of an accused person. It is only when even accepting as it is the evidence, which the prosecution-complainant proposes to adduce, no case is made out against the accused, the Court can discharge him otherwise not, as held by the Supreme Court in the case of OMWATI v. STATE :

2001 CriLJ1723 . Further in the case of R.S.NAYAK v. A.R.ANTULAY : 1986 CriLJ1922 , the Supreme Court has observed thus:

'45 In Abhey Dass v. Gurdial Singh, : 1971 CriLJ691 :

(1971 Cri LJ 691), this Court in a case instituted on complaint applied the prima facie test.....Untwalia, J. who spoke for the Court in that case, quoted with approval the view expressed by Shelat, J. in Nirmajit Singh Hoon v. State of West Bengal, : [1973]2SCR66 and what had been said in yet another earlier decision of the Court in Chandra Deo Singh v. Prokash Chandra Bose, : [1964]1SCR639 . In the case of Union of India v. Prafulla Kumar Samal, (a decision to which the trial Court referred), this Court was dealing with a case involving allegations relating to offences punishable under Section 5(2) read with Section 5(l)(d) of the Act and Section 120B, IPC, as here. Fazal Ali J. indicated that the Court has power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. In Superintendent and Remembrancer of Legal Affairs, West Bengal V. Anil Kumar, : 1979 CriLJ1390 a three Judge Bench of this Court said:

At this stage, as was pointed out by this Court in State of Bihar v. Ramesh Singh : 1977 CriLJ1606 , the truth, veracity and the effect of the evidence which the prosecution proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied. At this stage, even a very strong suspicion founded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify the framing of charge '

7. Not only the said decisions, Section 245 of Cr.P.C. is also to that effect:

'245 When accused shall be discharged.- (1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging, the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.'

(Underline emphasized)

So, keeping said provision in mind and well settled law, let me consider, whether the impugned orders could be sustained or not.

8. It is true, for an offence under Section 420 of I.P.C., as held by the Supreme Court in the case of STATE OF KERALA v. A.PAREED PILLAI AND ANR. : 1972 CriLJ1243 and in the case of S.W. PALANITKAR AND ORS. v. STATE OF BIHAR AND ANR. : 2001 CriLJ4765 , it has to be shown by the complainant that the intention of the accused was dishonest at the time of making the promise itself and not subsequent to it. So also, such dishonest intention of the accused at the beginning of the negotiations has to be made out by the averments in the complaint, as held by the Supreme Court in the case of HRIDAYA RANJAN PD. VERMA AND ORS. v. STATE OF BIHAR AND ANR. AIR 2000 SC 2341 relied on for the accused.

9. To appreciate said contention and to ascertain/know whether the allegations in the complaint attract Section 420 of I.P.C., necessarily complaint has to be referred. In this context, following averments in the complaint could be noted:

'2.... The complainant further submits that, in order to create an influential impression of Faith and Belief, the accused had also shown a few communications received by him from some American Universities, which led the complainant to believe that the accused can arrange and get a job in USA.

3.... And at that time the accused herein has promised and assured to get a job in any Bank at U.S.A. and also collected the Passport of the complainant. The complainant submits that the accused made the complainant to believe that the accused can get a job by using his powerful contacts and his good office, but in turn asked the complainant to use his good office to get him a term loan of Rs. 10, 00, 000.00 from the Bank for his new business venture

4....The complainant submits that at that time the accused has reaffirmed his promise of getting a job in U.S.A. if the complainant gets him the financial help, apart from repaying the amount along with interest within 3 years ...

5. The complainant submits that in order to create faithful and good impression the accused invited the complainant for pooja when he opened a Garment factory named M/s. Guru Export Garments at Wilson Garden, Bangalore Then he called the complainant inside and showed work orders for Rs. 5, 00, 000.00 and. asked the complainant about the financial assistance and he had asked earlier. Then the accused reiterated his promise of getting a job in any Bank at U.S.A., if the complainant could arrange financial assistance of Rs. 10, 00, 000.00 for the development of the business.

6....The complainant further submits that while availing the above loan, the accused herein has pre-planned and availed on different dates on the pretext that the above amount is required for his business, but later on the complainant came to know that the above amounts were not utilized for the business purpose, and it was availed only with a dishonest intention to cheat and deceive the complainant and leave away the jurisdiction of India with the amounts so availed.

8 ...At that stage the accused has successfully convinced the complainant by lying that the accused had got confirmation from his contacts at U.S.A. regarding the complainant's job at City Bank, New York, U.S.A. and took a formal application with Bio Data from the complainant...

11. The complainant submits the action of the accused in giving the false promise and the assurance to get a job at U.S.A. to the complainant, thereby dishonestly inducing the complainant to lend the amount, with a false promise and assurance to repay the same along with interest, showing the fabricated work orders to make believe the story of the accused, are all criminal in nature for which the accused is liable to be prosecuted. The illegal act of the accused falsely representing himself as a proprietor and executing 3. On demand Promissory notes and the deed of hypothecation, are all with a clear intention to cheat and deceive the complainant outrightly.

14. The complainant submits that with a malafide intention to deceive the complainant herein, the accused made a false promise and assurance to the complainant about getting a job at U.S.A. and made him to believe the accused by showing some communications received from few American Universities, lying about his contacts in America, thereby dishonestly inducing the complainant to part with amount by executing loan documents by falsely representing himself as proprietor promising to repay the same along with interest, and making the complainant to believe the accused for his job, even though the accused was not intending to get the job and further act of the accused leaving India, without clearing, the loan without securing the job as promised and without informing the complainant are only with a sole intention to cheat and deceive and....

15. The complainant submits that the accused herein has cheated and deceived the complainant and also dishonestly induced to part with money and thereby committed offence punishable under Section 420 of I.P.C.'

10. Said averments in the complaint and the conduct of the accused in representing himself as the Proprietor of M/s. Guru Export Garments, though not Proprietor, and executing promotes, agreement, etc., for and on behalf of said garment factory and assuring that in case of advancing loan for his business, he will get a job to the complainant in U.S.A. and collecting passport from the complainant then, etc., when considered, clearly/prima facie show that the inception itself, the respondent - accused and the dishonest intention of cheating the petitioner-complainant and requirements of Section 420 of I.P.C. are satisfied.

11. Of course, according to the petitioner-complainant, initially when the respondent-accused had shown few communications received from American Universities and about great demand of his thesis on genetics in western countries, he believed that the respondent-accused can arrange and get a job to him in U.S.A., but parting with money by the petitioner-complainant was only after the respondent-accused requested to advance money for business, agreeing to return the same with interest within three years with assurance to get a job to the complainant in any Bank in USA and that was also only after the complainant was taken to the garment factory at Wilson Garden for pooja and shown work orders

for Rs. 5 lakhs. So, simply because, at the beginning, the petitioner-complainant believed that the respondent-accused can arrange and get a job to him in USA, that does not take away the case of the petitioner-complainant from cheating by the accused when, on false assurances, he parted huge money of Rs. 9 lakhs for the business of garment factory, of which the accused was not the Proprietor. But, said aspect of the matter has not been considered at all by the learned Magistrate or by the learned Sessions Judge.

12. Simply because the petitioner-complainant believed the respondent - accused when assured to get a job in Citi Bank in America, it cannot be said to be highly improbable to believe it for the reason that the respondent- accused had not seen the land of America. So, the observations made and conclusion arrived at by the learned Magistrate that the allegations made against respondent-accused that he assured the complainant to get a job in America appears to be an imaginary one, cannot be upheld.

13. According to the learned Magistrate, the complainant had not at all put forth the details as to how he arranged the loan of Rs. 9 lakhs to the accused and was working as a clerk, it was highly impossible for the petitioner-complainant to lend huge sum of Rs. 9 lakhs to the accused out of his savings. But, this observations was made by the learned Magistrate without any basis and without giving an opportunity to the complainant. If complainant had been given an opportunity and thereafter had he failed to show his financial capacity or, if the accused had produced any such material to show the financial capacity of the complainant, the matter would have been different, but not now.

That apart, it is pertinent to note that, before this Court, the petitioner-complainant has produced income-tax returns, which show advancing Rs. 9 lakhs to the respondent - accused as well. Admittedly, the father of petitioner was having a financial firm and complainant was working as a clerk in the bank then. So, the learned Magistrate was certainly wrong in assuming and holding it as highly impossible for the complainant to lend such huge amount of Rs. 9 lakhs, particularly when, absolutely, there was no basis for that.

14. Simply because loan was advanced on different dates from June 1987 to February 1988 without obtaining any document(s) from the accused and the pronotes have been executed by the respondent - accused on 21.7.1988, those pronotes could not have been discarded without any reason or material brought on record by the respondent - accused, that too, without considering the friendly relations between the complainant and accused and other material available on record.

15. So also, mere silence on the part of the petitioner - complainant in not taking any action against the respondent - accused till the accused left India in May 1990, cannot be a ground to disbelieve the case of complainant when it is clearly alleged/ stated in the complaint that, inspite of efforts made, it was difficult for him to contact the respondent -accused and when contacted, the respondent - accused made assurance (false), which he believed and it was thereafter, the respondent - accused left India.

16. The schedule to the deed of hypothecation filed with the complaint shows 125 sewing machines with 75 motors fixed to them besides 2 cutting machines, 2 kaja button machines, 2 cutting tables and 3 office tables with 10 office chairs with arms as the hypothecated properties for the amount of Rs. 9 lakhs advanced by the petitioner - complainant to the respondent - accused but, according to the petitioner - complainant, later the machinery available in the said factory were sold before the accused left India. So, if 12 sewing machines with some other movables only were found, when attachment of the properties at the said factory was taken much after the accused left India in May 1990, it cannot be said that, as on the date of hypothecation ie., 13.4.1989 also, 12 machines only were available to assume and hold that huge amount of Rs. 9 lakhs had been advanced on hypothecation of said 12 machines, etc., only. Simply because the respondent - accused has denied the deed of hypothecation, it cannot be said that it could not have been acted upon.

17. The learned Magistrate has observed and taken into consideration the fact that only Xerox copy of hypothecation deed has been produced and not the original. For this, it may be noted that at no time, the complainant was asked to produce

original hypothecation deed. If the petitioner - complainant had failed to produce the original document(s) when called for, the matter would have been different, but not now. However, without giving any opportunity to the complainant to produce the originals by calling him to do so, the learned Magistrate has approached the matter with perversity without any basis and observed that the petitioner - complainant has produced Xerox copies and not original and taken that into consideration for the conclusion arrived at by him.

18. The learned Magistrate also gave importance to the fact of not filing any civil suit by the complainant in respect of the pronotes executed by the respondent - accused for Rs. 9 lakhs, which were barred by time as on the date of complaint and therefore, doubted the execution of the documents by the respondent - accused. Even for this also, there was no basis whatsoever to the learned Magistrate because not only the pronotes and deed of hypothecation were produced in support of his case that Rs. 9 lakhs had been advanced to the respondent -accused, even the correspondence between him and respondent - accused prima facie show that the respondent - accused had availed loan (of Rs. 9 lakhs) from complainant and in fact admitted the same, which could be said on the basis of letters dated 9.10.1990 and 27.10.1995 of the accused and other records filed by the petitioner - complainant with the complaint. All the said records and material were very much available before learned Magistrate. But, without considering them, on surmises and conjectures, the learned Magistrate has considered the matter with perversity and held against the complainant.

19. Simply because the petitioner - complainant did not file suit and his claim was barred by time when the dates of pronotes are considered, that cannot cast doubt about the transaction, when the circumstances and other material on record are considered with the sworn statement of the petitioner - complainant. It was not that the respondent - accused was in India after May 1990, or he was available to the petitioner - complainant, still he did not taken any action. On the other hand, admittedly, the respondent - accused left India in May 1990 itself and till then the complainant had hope on account of the conduct of the accused. Hence, for the silence or inaction on the part of the petitioner - complainant, no adverse inference could have been drawn by the learned Magistrate so as to discharge accused,

more so, when the accused did not come with any such material to doubt the transaction prima facie.

20. It is observed by the learned Magistrate that fax message produced at the time of sworn statement was shown as sent from U.S.A. though it is not so as it was from Jayanagar at Bangalore and that was done by the complainant with an intention to prejudice the mind of the Court against the respondent - accused. But, the records produced by the petitioner - complainant make it clear that it was the respondent - accused, who appears to have managed to show it as having been sent from USA though fax message was sent from Jayanagar at Bangalore and as such, the observation made by the learned Magistrate in that regard also is unsustainable.

21. It is true, as observed already, at the beginning it was the petitioner - complainant, who believed the respondent - accused that he could arrange and get a job to him in USA as he was ambitious to work in foreign country, but that was when the respondent - accused took him to IISC Campus, introduced to Dr. Naveen Chandra and shown few communications received by him (accused) from some American Universities and not earlier to/without that. So also, the conduct of the accused in getting passport from complainant and assuring to get a job in USA in case he advances loan of Rs. 10 lakhs for the business of accused, cannot be forgotten. However, unfortunately, the learned Magistrate did not consider said material and without that, he came to wrong conclusion.

22. It is also important to note that, according to the complainant, the accused wrongly represented himself as the Proprietor of M/s. Guru Export Garments though he was not, as could be seen from the records and letters written by the respondent-accused himself. But, still he executed pronotes, hypothecation deed etc., as the Proprietor of said garment factory and assured a job to complainant in USA with a promise to return the amount within 3 years, that too, with interest and made the petitioner - complainant to part with huge sum of Rs. 9 lakhs.

23. The documents produced by the complainant, complaint and his sworn statement show advancing Rs. 9 lakhs as loan to the respondent - accused on hypothecation of machinery, etc., of the garment factory. Still, on surmises, without

any basis or material whatsoever, the learned Magistrate made assumptions and doubted the transaction of advancing Rs. 9 lakhs to the respondent - accused by the petitioner - complainant.

24. The facts that the accused misrepresented himself as owner of factory, though not so, and obtained loan, but did not repay any part of the said loan before or after he left India in the year 1990 and, that 12 sewing machines with few articles only were found in the garment factory, though 125 sewing machines with other machinery had been hypothecated as per hypothecation deed and, that the accused left India in May 1990 without informing complainant and contacting the complainant then and thereafter for any purpose till he returned to India, were more than sufficient showing a prima facie case against the accused for framing charge for the offence of cheating.

25. Further, if there was no assurance or promise by the accused or if the complainant was not made to believe that the respondent - accused would get a job to him in USA, it has remained unexplained why the passport of the complainant was collected and retained its Xerox copy while returning it later.

26. Thus, when all the facts, circumstances and material available on record are considered along with the sworn statement of the complainant, the requisite intention to constitute the offence of cheating could be said to be present even when the tests laid down in the decisions relied on for the respondent - accused are kept in mind and applied to the case on hand and as such, they do not help him much.

27. At any rate, there was no circumstances or material whatsoever available to the learned Magistrate to discard or disbelieve or doubt the case of the complainant, which was supported by documents produced by the petitioner - complainant besides his sworn statement, particularly when the respondent - accused had not come forward with any such document or material or evidence to discard the material produced by the petitioner - complainant in support of the complaint and discharge him. Consequently, it could be said without any hesitation that the impugned order of the learned Magistrate is full of surmises and conjectures and not at all based on any material available on record. Hence, it

cannot be maintained. So also, the order passed by the Sessions Judge, who failed to consider the patent error committed by the learned Magistrate with perversity.

In the result, the petition is allowed. The impugned order dated 18.12.1998 passed by the learned VII Addl. C.M.M. at Bangalore in C.C.No. 17061/1997 and also the order dated 28.9.2001 of the learned Principal City and Sessions Judge, Bangalore City in Cr.R.P.No. 261/1998 are set aside, and the learned Magistrate is directed to restore the file to its original number and then to frame charge against the accused for the offence punishable under Section 420 of I.P.C. and proceed further in accordance with law.

Send back the L.C.R. forthwith and at any rate within 30 days and compliance be reported to the Registrar (Judicial).

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