

Kailash Sharma Vs. State

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Court : Delhi

Decided On : Jul-24-1972

Reported in : 1973CriLJ1021

Judge : M.R.A. Ansari, J.

Appellant : Kailash Sharma

Respondent : State

Judgement :

M.R.A. Ansari, J.

1. A challan was filed against the petitioner in the Court of the Magistrate 1st Class, Delhi, for an offence under Section 420, Indian Penal Code. The Prosecution case against the petitioner was that he, being a citizen of India, printed certain pamphlets and sent them to various foreign countries including Malaya. In these pamphlets, the petitioner represented that valuable gifts like cinema projectors, jewels etc., would be given to winners of lucky tickets and persons were invited to purchase the lucky tickets by sending postal orders. Some of these pamphlets were received by the two residents of Malaya by name Oathman and Abdul Bin Haji Ran. Acting upon these representations, these two persons purchased postal orders of 140 Malayan dollars each and sent them to the petitioner. These postal orders were actually received by the petitioner and were encased by him. No presents were, however, sent to these two persons and

it was discovered that the whole scheme was a hoax and the petitioner had never intended to send any presents to these persons.

A charge was framed against the petitioner on 4-2-1964 under Section 420, Indian Penal Code. During the course of the trial, the petitioner filed an application in the Court on 3-11-1966 challenging the jurisdiction of the Magistrate to try him on the ground that the offence was committed outside India and that Section 188, Criminal Procedure Code was a bar to the trial of the petitioner by the Court without a certificate from the Indian Political Agent as required by the first proviso to Section 188, Criminal Procedure Code, This application was dismissed by the learned Magistrate by his order dated 22-11-1966. Thereafter, the petitioner filed a revision petition in the Court of Session and the learned Additional Sessions Judge, who heard this revision petition, has submitted a report to this Court with a recommendation that the order of the learned Magistrate dated 22-11-1966 be set aside and the proceedings pending in his Court against the petitioner be quashed.

2. A preliminary objection has been raised by the learned Counsel for the State against the maintainability of the present revision petition in this Court. It has been contended that the petitioner ought to have filed a revision petition in the Court of Session against the charge framed against him by the Magistrate on 4-2-1964, that the revision filed by him in the Court of Session was in effect a revision petition challenging the charge framed against him and that as the revision petition was not filed within 90 days of the date of the framing of the charge, it was barred by time. I am unable to accept this contention. The application filed by the petitioner before the learned Magistrate on 3-11-1966 was an application under Section 188, Criminal Procedure Code and such an application could be filed at any time notwithstanding the fact that a charge had been framed against the petitioner against which he had not filed any revision petition. The revision petition filed by the petitioner in the Court of Session against the order of the learned Magistrate dismissing his application filed under Section 188, Criminal Procedure Code has been filed within time. The preliminary objection raised by the learned Counsel for the State is, therefore, overruled.

3. The offence of cheating for which the petitioner is being tried is defined in Section 415, Indian Penal Code in the following terms:'

Whoever, by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or not to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Explanation? A dishonest concealment of facts is a deception within the meaning of this section.

4. The two ingredients of the offence of cheating are:

(i) deceiving a person, and

(ii) fraudulently or dishonestly inducing the person so deceived to deliver any property to any person.

The two questions for consideration would be

(i) where did the deceiving take place? and

(ii) where did the persons deceived deliver the property?

If both these ingredients occurred outside India, then obviously Section 188, Criminal Procedure Code would apply and the trial Court would not have any jurisdiction to try the petitioner unless the condition mentioned in the first proviso to Section 188, Criminal Procedure Code is satisfied. According to the petitioner, the act of deceiving the complainant as well as the delivery of the property both took place in Malaya because the deceiving took place only when the complainants actually received the pamphlets which were received in Malaya and if the complainants had not received these pamphlets, no deceiving would have taken place notwithstanding the fact that the pamphlets were printed by the petitioner in India and also because the complainants delivered the property, namely, 140 Malayan dollars, each to the post office at Malaya and it was immaterial that the

petitioner ultimately received these postal orders and encased them in India. According to the prosecution, both the deceiving as well as the delivery of property took place in India, because it was from India that the petitioner had sent the pamphlets and it was in India also that he had received the postal orders from the complainants and had encased them.

5. In support of his contention that the act of deceiving took place only in Malaya, the petitioner seeks to rely upon the decision of the Supreme Court in *Mobarik Ali Ahmed v. State of Bombay* 0043/1957 : 1957 CriLJ1346 . The facts of that case may be briefly stated:

6. A businessman of Goa contacted: a commission Agent at Bombay for the import of rice to Goa. The Commission Agent in turn contacted one Jasawalla who was also a Commission Agent who happened to know a businessman in Karachi by the name of Mobarik Ali Ahmed. As a result of exchange of telegrams, letters and telephone messages between Jasawalla and Mobarik. Ali Ahmed on the one side and Jasawalla and the Goa businessman and his commission agent on the other, a contract was brought about for the purchase of 1,200 tons of rice at the rate of 51 per ton to be shipped from? Karachi to Goa. In pursuance of this contract, Goa businessman gave about Rupees. 5,50,000/- to Jasawalla who in turn passed: the money on to Mobarik Ali Ahmed. The latter, however, failed to deliver the rices-and he was prosecuted at Bombay for an offence under Section 420, Indian Penal Code. The jurisdiction of the Bombay Court was-challenged by Mobarik Ali Ahmed on the ground that both the ingredients of the offence of cheating, namely, the misrepresentation as well as the delivery of property,, took place in Karachi and not in India and that, therefore, the Indian Courts had no jurisdiction to try him.

The Supreme Court rejected this contention and on the facts of that case held that both the misrepresentation as well as the-delivery of property had taken place at Bombay and that, therefore, the Bombay Court had jurisdiction. This decision would: help the petitioner, because the Supreme Court held that although Mobarik Ali Ahmed' was not present in Bombay at any time and although Mobarik Ali Ahmed had written' letters to the Goa Businessman from Karachi or had talked to

him on the telephone from Karachi or had sent telegrams. to him from Karachi, the misrepresentation by Mobarik Ali Ahmed to the Goa businessman was not made at Karachi but was made at Bombay, because it was only when these letters .and telegrams reached the Goa businessman at Bombay and Mobarik Ali Ahmed could contact the Goa businessman at Bombay that the misrepresentation is said to have taken place. In the present case, although the petitioner had printed the pamphlets in India and although he had issued the pamphlets from India, it was only when they reached the complainants in Malaya that the misrepresentation or the deceit could be said to have taken place. thereforee, one of the ingredients of the offence of cheating must be held to have taken place at Malaya.

7. It is not necessary for the purpose of this case to decide whether the delivery of property which is the other ingredient of the offence of cheating also took place at Malaya or whether it took place in India, because even if one of the ingredients of the offence of cheating took place at Malaya, then the provisions of Section 188, Criminal Procedure Code would be attracted. There is a very illuminating judgment on this point of a Single Judge of the Madras High Court in *In Re M. L. Verghese* AIR 1947 Mad 352. In that case, a person was running a bank called the Malabar Central Bank with its Head Office at Chowghat and a branch office at Orumanayur, both places being situated in British India. The charge against him in both the cases was that he received gold ornaments from different persons by way of pledge and after doing so, sub-pledged them for higher amounts to other banks, at Tri-chur which is situated in State of Cochin. An objection similar to the one in the present case based upon Section 188, Criminal Procedure Code was raised in that case. The learned Judge examined the significance of the non obstinate clause in the first proviso of Section 188, Criminal Procedure Code which was inserted by the amendment of the Criminal Procedure Code in 1923 in the light of the following report of the Select Committee which proposed the amendment:

Certain decisions of the Madras High Court seem to make it doubtful whether Section 188 is subject to the provisions of Sections 179 to 184 and we think it is desirable to clear this up. We are not satisfied that this was the intention of Section 188, and in our opinion, it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the political Agent's certificate in

every case. The amendment which we propose will make this clear.

After referring to the above abstract from the report of the Select Committee, the learned Judge observed as follows:

After this amendment was effected, we have had a series of decisions of this Court which have held that Section 188 as amended is not governed or controlled by the preceding Sections 179 to 187 but in turn itself governs and controls the same.

The learned Judge then proceeded to refer to a number of decisions of the Madras High Court and in particular referred to the decisions of the Division Bench of that Court in *T. Fakhrulla Khan v. Emperor* : AIR1935 Mad326 in which it was specifically laid down that the British Indian Court had no jurisdiction under Section 188. Criminal Procedure Code as amended in 1923 to try an offence committed wholly or partly in the Native State without a certificate of the Political Agent. I am in respectful agreement with the view expressed by the learned Judge.

8. therefore, applying the rule laid down by the Supreme Court in *Mobarik Ali Ahmed's case* 0043/1957 : 1957 CriLJ1346 it must be held that a part of the offence, namely, the deceiving of the complainants by the petitioner, took place in Malaya. therefore, under the first proviso to Section 188, Criminal Procedure Code, a certificate of the Political Agent or the sanction of the State Government is a prerequisite for conferring jurisdiction on an Indian Court to try the petitioner. The reference made by the learned Additional Sessions Judge, is, therefore, accepted and the charge framed by the learned Magistrate as well as the proceedings pending against him are quashed.

9. In the result, the revision petition is allowed.